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Supreme Court, U.S.
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No. 97-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

KERR-MCGEE CORPORATION
AND CYPRUS FOOTE MINERAL COMPANY,

PETITIONERS,

v.

KEE TOM FARLEY, INDIVIDUALLY AND
ON BEHALF OF THE ESTATE OF LUCY K. FARLEY,
CARMELITA FARLEY JOE,
AND HAROLD KADY, SR., INDIVIDUALLY AND
ON BEHALF OF THE ESTATE OF JULIA MAE KADY,

RESPONDENTS.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a company that contracts with the federal government to process nuclear materials on an Indian reservation and is subsequently sued in tribal court by tribal members who allege injuries from those materials must exhaust tribal court remedies when it is apparent that the tribal court cannot have jurisdiction because Congress (a) has provided that the federal government exercises exclusive authority to regulate nuclear safety, and (b) has created an exclusive federal remedy for nuclear torts.

PARTIES TO THE PROCEEDING

All of the parties in the court of appeals are identified in the caption. In addition, the following persons were parties in the district court but did not enter an appearance in the court of appeals: Rio Algom, Ltd.; Umetco Minerals Corporation; and Union Carbide Corporation.

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Kerr-McGee Corporation has no parent companies. The following companies are non-wholly owned subsidiaries or affiliates of Kerr-McGee Corporation:

Ace Limited
Basic Management, Inc.
Devon Energy Corporation
National Titanium Dioxide Company Limited (Cristal)
Oil Casualty Insurance, Ltd.
Oil Insurance Limited
P&P Land Co.
Tiwest Pty. Ltd.
Tiwest Sales Pty. Ltd.
Tops Insurance Limited
Transworld Drilling Company (Nigeria) Limited
White Shoal Pipeline Corporation

The parent companies of Cyprus Foote Mineral Company*/ are:

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*/ The court of appeals' opinion refers to "Cyprus Foote Minerals Corporation." The correct name is Cyprus Foote Mineral Company.

Cyprus Annex Minerals Company
Cyprus Metals Company
Cyprus Specialty Metals Company

The following companies are non-wholly owned subsidiaries or affiliates of Cyprus Foote Mineral Company:

Foote Mineral Company Limited
Minera Cyprus Chile Limitada
Sociedad Chilena de Litio Ltda.

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Kerr-McGee Corporation ("Kerr-McGee") and Cyprus Foote Mineral Company ("Cyprus Foote") (collectively "petitioners") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-22a) is reported at 115 F.3d 1498. The opinion of the district court (App., *infra*, 23a-37a) is reported at 915 F. Supp. 273.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1997. A petition for rehearing and suggestion for rehearing *en banc* was denied on July 24, 1997. App., *infra.*, 61a-62a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent statutes are set forth at App., *infra*, 63a-71a.

STATEMENT

1. In 1952, the Atomic Energy Commission ("AEC" or "Commission"),[1/] established a uranium ore "buying station" in Shiprock, New Mexico, as part of the federal government's Domestic Uranium Procurement Program. The purpose of that Program was to develop domestic supplies of uranium concentrate, which were needed to fulfill urgent military requirements. As part of the Program, the AEC encouraged

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1/ The AEC's authority has since been transferred to the Nuclear Regulatory Commission and the Department of Energy.

private companies to process uranium ore to produce uranium concentrate.

In 1953, Kerr-McGee entered into a contract with the AEC, pursuant to which Kerr-McGee built and operated a uranium mill near Shiprock on reservation land that Kerr-McGee leased from the Navajo Tribe ("Tribe"). The AEC contract contained terms specifying when and how the mill would be built, the process through which uranium concentrate would be produced from uranium-bearing ores, and permissible sources of ore. Kerr-McGee and later Cyprus Foote operated the Shiprock mill.[2/] All of the uranium concentrate produced at the mill was delivered to the AEC for government use.

2. a. Petitioners' operation of the Shiprock mill was subject to pervasive regulation by the AEC under the Atomic Energy Act of 1954, as amended ("AEA"), 42 U.S.C. §§ 2011 *et seq.* (1994). In enacting the AEA, Congress specifically declared that the development and control of nuclear materials is "vital to the common defense" and that regulation of those materials promotes the "national interest." *Id.* §§ 2012(a) and (b). Pursuant to the AEA, the federal government occupied the entire field of regulating nuclear safety (with exceptions not pertinent here), *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 240-41, 249 (1984), and thus it exercises "exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession, and use of nuclear materials." *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 207

[2/] Kerr-McGee operated the mill until 1963, when it sold the mill to the Vanadium Corporation of America. Vanadium and its successor, Cyprus Foote, operated the mill until 1968. In 1973, Cyprus Foote's lease for the Shiprock mill site expired, and control of the site reverted to the Tribe.

(1983). Under this regime, the AEC regulated petitioners' acquisition, use, and distribution of nuclear "source material" at the Shiprock mill. *See* 42 U.S.C. §§ 2091-2099.

b. In 1957, Congress enacted the Price-Anderson Act as an amendment to the AEA in response to concerns expressed by "spokesmen for the private sector . . . that they would be forced to withdraw from the field if their liability were not limited by appropriate legislation." *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 64 (1978). The Price-Anderson Act had three main features: (1) it "established a limit on the aggregate liability of those who wished to undertake activities involving the handling or use of radioactive materials"; (2) it channelled liability for certain tort claims resulting from nuclear materials to the federal government; and (3) it provided that such nuclear tort claims above the amount of required private insurance "would be indemnified by the Federal Government, up to the aggregate limit on liability." S. Rep. No. 100-218, at 2 (1987).

In 1988, Congress amended the Price-Anderson Act to establish an exclusive adjudicatory framework covering *any* claim of alleged injury from nuclear materials. The Act creates a federal cause of action, called a "public liability action," for "any suit" arising out of a "nuclear incident." *See* 42 U.S.C. §§ 2014(hh), (w). It defines "nuclear incident" to include "any occurrence . . . within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, . . . arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material." *Id.* § 2014(q).

The Act also provides for original federal court jurisdiction over any public liability action, and it grants defendants an absolute right to remove to federal court any

such action brought in state court. *Id.* § 2210(n)(2). In addition, a public liability action is deemed to arise under federal law; while the substantive rules for decision are to be derived from state law, those rules must be consistent with the provisions of the Price-Anderson Act. *Id.* § 2014(hh).

3. a. In 1995, respondents, Navajo Tribe members Kee Tom Farley, his daughter Carmelita Farley Joe, and Harold Kady, filed a complaint in Navajo tribal court against the former operators of the Shiprock mill, seeking damages under Navajo law and alleging that the former mill released "vast quantities" of radioactive and toxic materials, causing them various injuries. Thereafter, petitioners filed suit in the United States District Court for the District of New Mexico seeking to enjoin the tribal court from adjudicating respondents' action. Kerr-McGee and Cyprus Foote argued that the tribal court lacked jurisdiction over respondents' claims of alleged injury from nuclear materials.

The district court ordered a stay of the federal court proceedings until petitioners have exhausted their remedies in tribal court. App., *infra,* 23a-37a. Noting that the Price-Anderson Act is "devoid of any mention of 'Indians,' 'tribes,' or 'tribal-court jurisdiction,'" the district court refused to infer that Congress intended the Act to limit tribal sovereignty. *Id.*, at 28a. According to the district court, petitioners were required to exhaust tribal remedies because Congress had not explicitly preempted tribal court authority to apply tribal law to claims of personal injury caused by exposure to nuclear material on Indian reservations. *Id.* at 29a-32a. Alternatively, the district court determined that, even if the Price-Anderson Act provides the sole cause of action for such claims, "this does not establish that tribal courts are without jurisdiction to apply Price-Anderson." *Id.* at 33a.

b. After calling for additional briefing on the implications of this Court's intervening decision in *Strate v. A-1 Contractors*, ___ U.S. ___, 117 S. Ct. 1404 (1997), the court of appeals affirmed. App., *infra*, 1a-22a. The court recognized that the Price-Anderson Act creates "sweeping" federal jurisdiction over all actions asserting public liability, which "encompasses *any* legal liability from 'nuclear incidents.'" *Id.* at 10a (emphasis in original). Moreover, it conceded that there was "some force" to petitioners' argument that "there exists a jurisdictional prohibition on all forums not mentioned in the 1988 [Price-Anderson] Amendments." *Id.* at 12a. The court nonetheless held that "[w]hile the precise scope of retained tribal jurisdiction in this case is subject to reasonable debate, tribal adjudicatory authority over this nuclear incident is not 'patently violative of an express jurisdictional prohibition,'" *id.* at 18a, and that abstention in favor of tribal exhaustion "is appropriate." *Id.* at 21a.

The court of appeals rejected petitioners' argument, based on *Strate* and its predecessors, that the tribal exhaustion rule does not apply because the Tribe cannot regulate nuclear activities and hence could not adjudicate claims arising from such activities. App., *infra*, at 16a-17a & n.6. The court of appeals concluded that the federal courts must abstain from reviewing "the jurisdictional determinations of the Navajo district court before the tribal appellate process has run its course." *Id.* at 21a-22a.

c. In the meantime, following the district court's decision but before the court of appeals had acted, the Navajo tribal court issued an order finding that it had jurisdiction over respondents' claims. App., *infra*, 38a-60a. The tribal court held that the Price-Anderson Act does not preempt its authority to adjudicate nuclear tort claims. *Id.* at 54a-55a. Indeed, it held that the Act does not apply at all to

respondents' claims of injury from nuclear materials. *Id.* at 59a.

Navajo law does not provide for an interlocutory appeal as a matter of right from the Navajo court's jurisdictional ruling.[3/] Thus, as a result of the Tenth Circuit's ruling, petitioners face the prospect of a lengthy and inevitably complex trial in the Navajo District Court, followed by a discretionary appeal from an adverse judgment in the Navajo Supreme Court, before they can obtain a hearing in federal court on the merits of their jurisdictional challenge.

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the applicability of the "tribal exhaustion rule." The decision below would deprive a defendant of immediate recourse to federal court to challenge tribal court jurisdiction over a claim that Congress has deemed to be a federal cause of action, and that arises out of activities as to which the federal government has completely occupied the field, divesting the tribe of all regulatory authority.

Despite Congress' intent to create an exclusive federal scheme governing the regulation of nuclear safety, and its express goal of establishing a uniform framework governing all litigation resulting from nuclear incidents, the court of appeals has required petitioners to exhaust tribal remedies before they may seek relief in federal court. This ruling is squarely contrary to the decisions of this Court and conflicts

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[3/] *See* Navajo Nation Code tit. 7, § 801(A) (Equity 1995) (appeal available only from a "final judgment or other final order of a District Court of the Navajo Nation"); *Billie v. Abbott*, 5 Navajo Rptr. 201, 203 (1987).

with the decisions of other courts of appeals holding that exhaustion should not be required when there is no plausible basis on which the tribal court could exercise jurisdiction.

The AEA comprehensively regulates all aspects of nuclear safety anywhere within the United States. It leaves no room for regulation by Indian tribes. Because the Navajo Tribe clearly lacks jurisdiction to regulate nuclear safety on the reservation, this Court's precedents dictate that the Tribe also lacks jurisdiction to adjudicate cases alleging injuries arising out of a nuclear incident. *Strate*, 117 S. Ct. at 1413. In these circumstances, no legitimate purpose is served by requiring the exhaustion of tribal remedies.

There is a separate reason why tribal courts lack jurisdiction over nuclear torts. Spurred by the same concerns that led to the AEA's preemptive regulation of nuclear safety, Congress also has provided an exclusive system of adjudication for nuclear tort claims. In the 1988 amendments to the Price-Anderson Act, Congress intended "to effect uniformity, equity, and efficiency in the disposition of public liability claims." *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 857 (3d Cir. 1991)("*TMI*"); *see* H.R. Rep. No. 100-104, pt. 1, at 18 (1987). Because the Act's adjudicatory scheme requires application of federal law to all claims of injury from nuclear materials and clearly reflects an intent to make a federal forum available to resolve all such claims,[4/] it preempts tribal law and leaves no room for tribal courts to exercise jurisdiction over nuclear torts. Indeed, tribal court jurisdiction over public liability actions would frustrate Congress' intent to ensure that "all claims resulting from a given nuclear incident would be governed by the same law."

4/ *See* 42 U.S.C. § 2210(n)(2) (providing absolute right of removal to federal court from a state court).

TMI, 940 F.2d at 857 (citing H.R. Rep. No. 100-104, pt. 3, at 18 (1987)). Given the Price-Anderson Act's preclusion of tribal court jurisdiction, it follows from *Strate* that a defendant sued for a nuclear tort in tribal court need not exhaust tribal remedies.

The issue presented by this case has arisen in other cases and is certain to recur. Many uranium mills and other nuclear facilities have operated on or in the vicinity of tribal lands. Absent review by this Court, the decision of the court of appeals will permit tribes to conduct trials of cases over which they have no jurisdiction, and litigants will be required to exhaust tribal remedies at great cost to themselves, other parties, and the tribal courts. Accordingly, this case presents an important issue that warrants prompt review by this Court.

I. The Decision Below Is Contrary To Decisions Holding That Tribal Exhaustion Is Not Required Where A Tribe Lacks Authority To Regulate And Hence To Adjudicate.

Strate and its predecessors show that tribal exhaustion is not required if the cause of action is based on an activity over which the tribe has no regulatory authority and, therefore, no authority to adjudicate. The court of appeals' contrary conclusion cannot be reconciled with this Court's decisions.

Strate addressed two related questions: (1) If it is clear that a tribe does not have regulatory jurisdiction over an activity -- because either Congress has withdrawn jurisdiction or the tribe has surrendered it -- may the tribe still exercise jurisdiction to adjudicate claims arising out of that activity? (2) If it may not, is exhaustion appropriate? *Strate* answered both questions in the negative.

The Court in *Strate* first considered a line of authority represented by *Montana v. United States*, 450 U.S. 544 (1981), and *South Dakota v. Bourland*, 508 U.S. 679 (1993). The Court in *Montana* observed that, as a general matter, the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." 450 U.S. at 564. Thus, the Court held that a tribe's "inherent sovereign powers" generally "do not extend to the activities of nonmembers of the tribe." *Id.* at 565. The Court pointed out, however, that in some circumstances a tribe may retain authority to regulate nonmembers' activity that relates to a consensual relationship with the tribe or that directly affects "the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566.

Bourland held that even this retained authority is lost where tribal regulation of an activity would be inconsistent with comprehensive federal regulation. *Bourland,* 508 U.S. at 689. Thus, the Court held that the Flood Control Act and the Cheyenne River Act, which gave the Army Corps of Engineers regulatory control over certain tribal lands, impliedly preempted the authority of the Cheyenne River Sioux to regulate those lands.

The second line of authority considered in *Strate* is represented by two cases, *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987). Both cases stand for the proposition that a defendant may be required to exhaust remedies in the tribal court if there is a real possibility that the tribal court could have jurisdiction over the claim.

National Farmers was the first case to announce this principle, holding that a tribal court should have the first opportunity to determine the scope of its jurisdiction over a personal injury suit arising from a traffic accident brought against a nonmember in the tribal court. 471 U.S. at 856-57. This Court reasoned that Congress had not granted federal courts jurisdiction over such civil actions, and therefore the tribal court's "jurisdiction over non-Indians *in a case of this kind* is not automatically foreclosed." *Id.* at 855 (emphasis added). Stressing Congress' historic policy of supporting tribal self-government, the Court deferred to the tribal courts' ability to determine the scope of their jurisdiction and to "provide other courts with the benefit of their expertise" in that regard. *Id.* at 856-57. At the same time, the Court was careful to point out that exhaustion would not be required, *inter alia*, "where the action is patently violative of express jurisdictional prohibitions." *Id.* at 856 n.21.

Iowa Mutual elaborated *National Farmers'* discussion of the policies underlying the tribal exhaustion rule. *Iowa Mutual* involved claims of personal injury asserted by an Indian and arising out of a truck accident on Indian lands. The question in *Iowa Mutual* was whether the general diversity jurisdiction statute, 28 U.S.C. § 1332, divests tribes of their jurisdiction over civil suits brought against nonmembers arising out of activity on the reservation. Noting that "Congress undoubtedly has the power to limit tribal court jurisdiction," 480 U.S. at 17, this Court went on to state that "'[c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Id.* at 18. Concluding that the diversity statute contained no "indication that Congress intended . . . to limit the jurisdiction of the tribal courts," the Court held that tribes retain authority to adjudicate some civil suits between members and nonmembers. *Id.* The Court emphasized that exhaustion "is

required as a matter of comity, not as a jurisdictional prerequisite," 480 U.S. at 16 n.8, but it stated that federal courts should defer to tribal courts, which "are best qualified to interpret and apply *tribal law*." *Id.* at 16 (emphasis added).

Against this background, *Strate* considered whether *National Farmers* and *Iowa Mutual* affect a tribe's adjudicatory jurisdiction over claims arising out of activity that the tribe lacks jurisdiction to regulate. The tribal-member petitioners argued that the principles announced in *Montana* did not limit *Iowa Mutual*'s assertion that "'[c]ivil jurisdiction over [on-reservation activities] presumptively lies in the tribal courts.'" *Strate*, 117 S. Ct. at 1412 (quoting *Iowa Mutual*, 480 U.S. at 18). But this Court rejected the argument. In so doing, the Court made clear that *Iowa Mutual* merely stood for the much narrower and "unremarkable" proposition that, "*where tribes possess authority to regulate the activities of nonmembers*, '[c]ivil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts.'" 117 S.Ct. at 1413 (quoting *Iowa Mutual*, 480 U.S. at 18) (emphasis added). The Court in *Strate* underscored that the converse proposition also applies: "As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction. Absent congressional direction enlarging tribal-court jurisdiction, we adhere to that understanding." 117 S.Ct. at 1413.

Strate went on to examine the effect that a tribal court's demonstrable lack of jurisdiction has on the tribal exhaustion rule. The Court first reiterated that the rule is merely "prudential," and has no impact on the scope of a tribe's jurisdiction. *Id.* The Court then reasoned that when "it is plain" that a tribe lacks jurisdiction over a nonmember's conduct, "it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct." *Id.* at 1416 n.14. "Therefore, when tribal-court

jurisdiction over an action such as this one is challenged in federal court, *the otherwise applicable exhaustion requirement must give way, for it would serve no purpose other than delay.*" *Id.* (internal citation omitted) (emphasis added).

The decision of the court of appeals here is flatly inconsistent with *Strate* and its predecessors in two important respects. First, the court held that the Navajo District Court may have jurisdiction to adjudicate respondents' claims, even though the Tribe lacks authority to regulate nuclear safety matters. As the court acknowledged, the Atomic Energy Act made nuclear safety "a particularly federal concern," and preempts all state regulation in this area "with very few exceptions." *Id.* at 8a (citing *Pacific Gas*, 461 U.S. at 209-10). Congress has thus limited the Tribe's sovereignty with respect to nuclear safety matters. *Strate* and its predecessors teach that, because the Navajo Tribe has no authority to regulate nuclear safety, it also has no authority to adjudicate claims alleging injury from nuclear materials.[5/]

Second, the court of appeals applied the tribal exhaustion rule, even though "it is plain" that the Navajo tribal court lacks jurisdiction over respondents' action. *See Strate*, 117 S. Ct. at 1416 n.14. As in *Strate*, exhaustion "would serve no purpose other than delay," *id.*, because a federal court must eventually conclude that the Tribe lacks jurisdiction over nuclear torts.

[5/] The court of appeals attempted to distinguish *Strate* by noting that the nuclear torts alleged by respondents "did not occur on lands over which the tribe has ceded authority and control to another sovereign for an indefinite period. Here, the lease was to a private entity and for a finite period." App., *infra*, at 16a n.4. This purported distinction is unavailing. As *Montana, Bourland*, and *Strate* make clear, where a tribe lacks regulatory authority, it may not exercise adjudicatory authority.

The decision below is not only contrary to this Court's decisions, it also is in conflict with the ruling of the Eighth Circuit in *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community*, 991 F.2d 458, 463 (8th Cir. 1993). The court there held that exhaustion of tribal court remedies was not required where a federal statute preempted the tribal ordinance that provided the sole source of a remedy in the tribal court. The court first determined that the Hazardous Materials Transportation Act preempted the tribe's authority to enact an ordinance subjecting all shipments of radioactive substances to licensing and pre-notification requirements. *Id.* at 461-62. It then found that exhaustion of tribal remedies could not be required under the circumstances: "The only remedies are those created in the [tribal] ordinance itself, and those remedies are void by virtue of the ordinance's preemption. This leaves [the nonmember litigant] with nothing to exhaust." *Id.* at 463. The court concluded that its refusal to require exhaustion was appropriate because, where a tribe possesses no authority to regulate in the first instance, an injunction against unauthorized tribal activity does not impinge on tribal self-governance. This same reasoning shows that the court below should have concluded that exhaustion of a non-existent tribal remedy was not required.

In sum, under the pervasive federal regulatory scheme of the AEA the Navajo Tribe has no authority to regulate nuclear safety. This Court's precedents, as illustrated by *Strate*, stand for the proposition that a tribe lacks authority to adjudicate claims arising out of activity that Congress has prohibited the tribe from regulating. Because the tribal court is without jurisdiction, the court of appeals erred in holding that petitioners were obligated to exhaust tribal remedies.

II. Tribal Exhaustion Is Not Required Where Congress Has Provided An Exclusive Federal Remedy And Adjudicatory Framework.

There is a second basis for concluding that tribal courts lack jurisdiction over nuclear tort claims and, hence, that there is no need to exhaust tribal remedies. Here, the court of appeals acknowledged that "[t]he [Price-Anderson Act] on its face provides the sole remedy for the torts alleged in this case." App., *infra*, at 11a. But the court failed to recognize the necessary consequence of this determination — namely, the Price-Anderson Act's exclusive remedial system precludes tribal court jurisdiction, either to apply Navajo law (as the tribal court determined) or to apply the Act's public liability provisions (as the court of appeals suggested). And, under the reasoning of *Strate* and its predecessors, exhaustion should not be required where, as here, the tribal court cannot have jurisdiction.

In the 1988 amendments to the Price-Anderson Act, Congress sought "to effect uniformity, equity, and efficiency in the disposition of public liability claims." *TMI,* 940 F.2d at 857; *see* H.R. Rep. No. 100-104, pt. 1, at 18. To achieve that end, Congress created a federal cause of action for all claims of injury from nuclear materials.[6] *See TMI,* 940 F.2d at 854 ("[a] claim growing out of any nuclear incident is compensable under the terms of the [Price-Anderson]

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[6] *See* 42 U.S.C. § 2014(hh) (defining "public liability action" to include "any suit" asserting "public liability"); *id.* § 2014(w) (defining "public liability" to mean "any legal liability arising out of or resulting from a nuclear incident"); *id.* § 2014(q) ("nuclear incident" includes "any occurrence . . . within the United States causing . . . bodily injury, sickness, disease, or death, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source . . . material); *id.* § 2014(z)("source material" includes "uranium").

Amendments Act or *it is not compensable at all*") (emphasis in original). *See also Nieman v. NLO, Inc.*, 108 F.3d 1546, 1552 (6th Cir. 1997); *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1099 (7th Cir. 1994).

The remedial scheme created by Congress embodies several elements that are irreconcilable with tribal jurisdiction. The cause of action is governed by preemptive federal substantive law, albeit federal law that incorporates aspects of state law. *See* 42 U.S.C. § 2014(hh); *O'Conner,* 13 F.3d at 1094-1101. Although Congress envisioned that this exclusive federal remedy might be pursued in state as well as in federal court, it provided a defendant with an automatic right of removal to federal court of any action commenced in state court. *See* 42 U.S.C. § 2210(n)(2). In addition, if the claim is covered by an indemnification agreement with the Nuclear Regulatory Commission or the Department of Energy, the Commission or the Secretary, as appropriate, may "take charge of [the] action," *id.* § 2210(h), and remove a state action to federal court, *id.* § 2210(n)(2). Moreover, Congress created a comprehensive scheme for the consolidation and management of all actions arising from a single nuclear incident in federal court. *Id.* § 2210(n)(3).

In light of the scope of these adjudicatory provisions, it is inconceivable that Congress intended to allow tribal courts to resolve actions arising out of nuclear incidents. The Price-Anderson Act and its amendments were designed to "remove[] a deterrent to private sector participation in the government's nuclear energy programs" by establishing an integrated adjudicatory system governed by federal rules that limits potential liability for nuclear torts. H.R. Rep. No. 100-104, pt. 2, at 5 (1987). *See also Duke Power,* 438 U.S. at 64. Thus, by preempting all inconsistent substantive law, the Act ensures that a common, federal standard of care will be applied in all jurisdictions to adjudicate liability for nuclear

torts.[7] *See, e.g., Silkwood,* 464 U.S. at 250; *TMI*, 940 F.2d at 858; *O'Conner*, 13 F.3d at 1104-05. Tribal courts, however, might well seek to apply a standard of care that is significantly different from that established by federal law.[8] Indeed, exactly that result is likely here because the Navajo tribal court held that tribal law — and not the Price-Anderson Act — applies to respondents' action. App., *infra,* at 59a. But that result is barred by the preemptive effect of the Price-Anderson Act.

The Price-Anderson Act also contemplates the consolidation in a single court of all claims arising out of the same nuclear incident. Congress fully appreciated that, absent consolidation, differences among state laws might result in persons exposed to the same nuclear incident receiving disparate treatment "simply by reason of an invisible State boundary." S. Rep. No. 89-1605, at 8 (1966), *reprinted in*

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[7] Even if a defendant (or the federal government) decides not to remove a public liability action from state to federal court, the state court decision would ultimately be subject to review in this Court, which serves to assure that federal law has been applied properly. *See* 28 U.S.C. § 1257(a). In contrast, there is no right of removal from a tribal court, and it is not clear whether a decision by a tribal court can be reviewed on the merits in a federal court. *See Iowa Mutual*, 480 U.S. at 19. Thus, tribal jurisdiction would thwart Congress' intent to exercise exclusive federal control over nuclear safety and to establish an adjudicatory regime that assures consistent results under a single federal standard.

[8] Tribal courts could also deprive a litigant of other protections afforded by federal law. For example, the admissibility of expert testimony can be crucial in an action to recover for injuries allegedly caused by exposure to nuclear materials. In federal court, the defendant would be assured that the standard enunciated by this Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), would govern the admission of such testimony. *See, e.g., O'Conner*, 13 F.3d at 1106 (applying *Daubert* in a public liability action). No such assurance would be afforded to a defendant in a tribal court action.

1966 U.S.C.C.A.N. 3201, 3208. If tribal courts were allowed to conduct trials of nuclear tort claims, there would be no mechanism for removal to federal court and consolidation. Indeed, if the case involved a claim covered by an indemnification agreement, the federal government would be deprived of its right to a federal forum.

Similarly, the Price-Anderson Act, as amended in 1988, bars the award of punitive damages against any entity indemnified by the federal government under the Act.[9/] That same entity, however, could find itself named as a defendant in a nuclear tort case brought in tribal court, and might be forced to defend there against punitive damage claims. The very relief that Congress intended to preclude might thus be resurrected.

In short, the Price-Anderson Act "creates a federal cause of action which did not exist prior to the Act, establishes federal jurisdiction for that cause of action, and channels all legal liability to the federal courts through that cause of action." *O'Conner*, 13 F.3d at 1101. This scheme clearly precludes tribal court jurisdiction over respondents' suit.

Nonetheless, the court below declined to foreclose tribal jurisdiction, deeming it significant that the Price-Anderson Act does not specifically refer to Indian tribes. App., *infra*, 12a-13a, 18a. This omission is not determinative, however, because federal laws of broad applicability are generally presumed to apply to Indians and Indian reservations regardless whether Indians or reservations are specifically mentioned. *See Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960). Moreover, the court below

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9/ *See* 42 U.S.C. § 2210(s). Congress enacted this provision to overrule in part this Court's holding in *Silkwood*, 464 U.S. at 258.

considered only whether the Act "explicitly create[s] *exclusive* federal court jurisdiction over nuclear incident litigation." App., *infra,* at 12a (emphasis in original). But no decision of this Court requires that Congress must give federal courts exclusive jurisdiction over suits arising out of a nonmember's on-reservation activity in order to divest tribes of their adjudicatory jurisdiction over such activity. For example, Congress never expressly provided that federal courts have exclusive jurisdiction over all criminal acts committed by nonmembers on reservations, yet this Court has held that Congress impliedly divested tribes of their authority to exercise such criminal jurisdiction. *See Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 204 (1978); *Montana,* 450 U.S. at 565.

Because, at the end of the day, a federal court must conclude that tribal courts are without jurisdiction over nuclear torts, *Strate* teaches that tribal exhaustion "would serve no purpose other than delay." 117 S.Ct. at 1416 n.14. Indeed, requiring exhaustion in these circumstances would not serve the purpose that the exhaustion rule seeks to serve — the promotion of tribal self-governance. *See National Farmers*, 471 U.S. at 856. As *Strate* and its predecessors make clear, "'[a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations.'" *Strate*, 117 S.Ct. at 1416 (quoting *Montana,* 450 U.S. at 564). There is simply no point in requiring exhaustion in an action in which tribal law can play no role.

Thus, in *Altheimer & Gray v. Sioux Manufacturing Corp.*, 983 F.2d 803, 814-15 (7th Cir. 1993), the Seventh Circuit held in similar circumstances that exhaustion of tribal remedies was not required because the goal of promoting tribal self-government would not be served. The court pointed out that "the principal dispute between the parties" concerned

"the application of a federal statute," and the other issues concerned "a contract that both parties agreed would be interpreted under Illinois law." *Id.* at 814. In this situation, "the tribal exhaustion rule would place before the tribal court a dispute that must be resolved by laws of distant jurisdictions." *Id.* Exactly the same concerns apply to this case: here the substantive dispute requires application of state and federal law (42 U.S.C. § 2014(hh)), *both* of which are foreign to the tribal court.

Similarly, in *Burlington Northern R.R. v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991), a railroad brought an action in federal court seeking a declaration that the tribe lacked power to tax the railroad's on-reservation right of way. The Ninth Circuit held that exhaustion of tribal remedies was not required, because "[t]he complaint presents issues of federal, not tribal, law"; "the tribal court possesses no special expertise" over the matters at issue; and exhaustion therefore "would not have assisted the district court in deciding federal law issues." *Id.* at 901 n.2. The same reasoning applies here.

In sum, requiring tribal exhaustion in connection with nuclear tort claims is fundamentally inconsistent with the goals Congress sought to achieve in the Price-Anderson Act. Certiorari is warranted to ensure both that Congress' purposes are given effect.

III. The Issue Is A Recurring One.

Absent review by this Court, the issue presented by this case is certain to recur.[10/] Thousands of Indians have worked in, or resided near, uranium mines and processing facilities located on or in close proximity to Indian reservations. Many of these individuals may seek to bring claims in tribal courts similar to respondents' claims here.[11/] This Court's prompt attention is therefore warranted to ensure both that the defendants will have recourse to federal court without having first to subject themselves to costly trials in tribal court, and that all such claims are adjudicated in accordance with the Price-Anderson Act.

Between 1948 and 1980, more than 4,000 uranium mine leases were issued on the Colorado Plateau, which extends

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[10/] Indeed, the Navajo District Court has attempted to assert jurisdiction in at least two other similar cases. *See Richards v. Texas Zinc*, No. KY-CV-002-95 (Navajo D. Ct.); *Neztsosie v. El Paso Natural Gas Co.*, No. TC-CV-0052-95 (Navajo D.Ct.). The defendants in these cases sought injunctions in federal district court to bar the tribal plaintiffs from seeking relief in the tribal courts. The federal court granted only limited injunctive relief, barring the tribal courts from adjudicating claims under the Price-Anderson Act but refusing to enjoin the tribal courts from adjudicating claims under tribal law. *El Paso Natural Gas Co.* v. *Neztsosie*, No. CIV-96-0049-PCT-RGS (D. Ariz. Nov. 3, 1996), *appeal pending*, No. 96-17121 (9th Cir.); *Cyprus Foote Minerals Co. v. Richards*, No. CIV-96-01524-PCT-RGS (D. Ariz. Nov. 21, 1996), *appeal pending*, No. 96-17139 (9th Cir.).

[11/] Counsel for respondents admitted that "thousands" of Indian mineworkers, their families, and families living near uranium mills and mines are potential plaintiffs in public liability actions. Appellants' Court of Appeals Appendix ("C.A. App.") at 79-80. Respondents' counsel also referred to "Does 1 through 1000" as plaintiffs in respondents' tribal court complaint, but none of the "Does" was ever identified. *See* C.A. App. at 45.

into Utah, New Mexico, Arizona, and Colorado. The Plateau encompasses the reservations of numerous Indian tribes, including the Navajo, Hopi, Ute, Jicarilla, Zuni, Ramah, Uintah and Ouray, and Pueblo tribes. These uranium mines provided raw materials to at least 20 federally licensed milling facilities in the general vicinity of the mines.[12/] Moreover, uranium refining and nuclear power plants also operate in the Pacific Northwest, where the Colville, Yakima, and Spokane Tribes have reservations, and in Tennessee, where the Qualla Boundary Tribe has a reservation. Actions alleging a nuclear incident resulting from the operation of any of these facilities would come within the scope of the Price-Anderson Act.

If the decision of the court of appeals is allowed to stand, however, nuclear tort claims could be initiated in a variety of tribal courts. If exhaustion were required, the defendants could be subjected to extensive and ultimately pointless litigation in the tribal courts. This Court should grant review to prevent such a result, which Congress surely did not intend.

12/ For a list of these mills and their locations, *see* 42 U.S.C. § 7912; *see also* Report on the Uranium Mill Tailings Radiation Control Act of 1978, H.R. Rep. No. 95-1480, pt. 2, at 32 (1978). The list of milling sites includes Shiprock, New Mexico, the location of the former uranium processing facility operated by petitioners.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: October 22, 1997

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 95-2121, 95-2127

KERR-McGEE CORPORATION,
Plaintiff-Appellant,

and

Cyprus Foote Minerals Corporation; Rio Algom, Ltd.;
Umetco Minerals Corporation; Union Carbide Corporation,
Plaintiffs,

v.

Kee Tom FARLEY, individually and on behalf of the Estate of Lucy K. Farley; Carmelita Farley Joe; Harold Kady, Sr., individually and on behalf of the Estate of Julia Mae Kady,
Defendants-Appellees.

KERR-McGEE CORPORATION; Rio Algom, Ltd.;
Umetco Minerals Corporation; Union Carbide Corporation,
Plaintiffs,

and

Cyprus Foote Minerals Corporation,
Plaintiff-Appellant,

v.

Kee Tom FARLEY, individually and on behalf of the Estate of Lucy K. Farley; Carmelita Farley Joe; Harold Kady, Sr., individually and on behalf of the Estate of Julia Mae Kady,
Defendants-Appellees.

June 25, 1997

Before SEYMOUR, Chief Judge, LOGAN and LUCERO, Circuit Judges.

LUCERO, Circuit Judge.

This case involves the scope of the tribal exhaustion rule in the context of the Price-Anderson Act. Appellants Kerr-McGee and Cyprus Foote Minerals (collectively "Kerr McGee") filed a claim in the District of New Mexico for a declaratory judgment and preliminary injunction, arguing that the Navajo Tribal Court is without jurisdiction to adjudicate nuclear tort claims against Kerr-McGee. Applying the tribal exhaustion rule, the district court denied the injunction and stayed further action in federal court until the tribal court ruled on jurisdiction. Our jurisdiction to hear Kerr-McGee's interlocutory appeal arises under 28 U.S.C. § 1292(a)(1). We affirm.

I. BACKGROUND

Kerr-McGee milled uranium on the Navajo Reservation between 1952 and 1973, leasing land for the mill site from the tribe. Kerr-McGee sold the mill's entire production to the

federal government. In 1995, defendants (the "Tribal Claimants"), who are members of the Navajo Tribe and residents of the reservation, filed a complaint in Navajo Tribal Court, alleging that the Kerr-McGee mill released vast quantities of radioactive and toxic materials, causing them injuries. Before the tribal court had proceeded with the case, Kerr-McGee filed the instant suit.

In the district court, Kerr-McGee argued that the tribal court had no jurisdiction to consider nuclear tort claims and should be enjoined in its proceedings, basing its conclusion on the Price-Anderson Act, 42 U.S.C. § 2011 *et seq.* Kerr-McGee contends that the Price Anderson Act grants exclusive federal jurisdiction over nuclear torts if a defendant so wishes. The district court disagreed, finding that the Price-Anderson Act does not specifically divest tribal courts of jurisdiction over such claims. Because there is no explicit mention of exclusive federal court jurisdiction over Price-Anderson claims, the district court reasoned that the tribal court should ordinarily be given the first opportunity to determine its own jurisdiction. Moreover, because the Tribal Claimants alleged a cause of action based on torts committed on the reservation, the district court felt no need to engage in any extended comity analysis regarding the decision to defer to the Navajo Tribal Court. It concluded that the proper practice was to stay the federal court proceedings until the tribal court had determined its jurisdiction.

Thereafter, the District Court of the Navajo Nation issued an order finding tribal court jurisdiction over the tort claims asserted by the Tribal Claimants. *Farley v. Kerr-McGee,* No. 103-95 (Navajo D. Ct. Aug. 1996). Specifically, the Navajo court held that the Price-Anderson Act does not preempt the Tribal Claimants' Navajo law right to tribal court adjudication of the alleged torts. In fact, the Navajo court concluded that the Price-Anderson Act does not apply at all to the Tribal

Claimants' suit and, therefore, tribal court jurisdiction could not interfere with Congressional intent in federal regulation of nuclear activity. We are unaware of any appeal by Kerr-McGee of the Navajo District Court order.

II. DISCUSSION

The scope of a tribal court's jurisdiction is a federal question over which federal district courts have jurisdiction. *National Farmers Union Ins. Cos. v. Crow Tribe,* 471 U.S. 845, 853, 105 S.Ct. 2447, 2452, 85 L.Ed.2d 818 (1985). The district court's determination of the proper scope of the tribal exhaustion rule is reviewed de novo. *Texaco v. Zah,* 5 F.3d 1374, 1376 (10th Cir. 1993).

A

The tribal exhaustion rule was created in *National Farmers,* a case involving a tort suit by a tribal member against a school district and its insurer. The tribal member brought suit in tribal court, and the defendants promptly sued in federal court for a declaration that the tribal court had no jurisdiction to entertain a civil suit against a non-Indian, even where the alleged tort took place on the reservation. Rather than further extending the rule in *Oliphant*[1/] to tribal jurisdiction over civil matters, the Supreme Court concluded:

> [T]he existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered,

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1/ In *Oliphant v. Suquamish Indian Tribe,* tribal courts were found to lack criminal jurisdiction over non-Indians for crimes committed on the reservation. 435 U.S. 191, 208-12, 98 S.Ct. 1011, 1020-23, 55 L.Ed.2d 209 (1978).

> divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.

National Farmers, 471 U.S. at at [sic] 855-56, 105 S.Ct. at 2453-54. Moreover, "that examination should be conducted in the first instance in the Tribal Court itself." *Id.* This rule of tribal court exhaustion is subject to a narrow set of exceptions, including: (1) "where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith"; (2) "where the action in tribal courts is patently violative of express jurisdictional prohibitions"; or (3) "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the tribal court's jurisdiction." *Id.* at 857 n. 21, 105 S.Ct. at 2454 n. 21 (internal quotation and citation omitted).

The tribal exhaustion rule was extended and explained in *Iowa Mutual Insurance Co. v. LaPlante,* 480 U.S. 9, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987). There, the Court held that the statute granting federal courts jurisdiction over diversity actions, 28 U.S.C. § 1332, does not divest tribal courts of jurisdiction over acts involving non-Indians taking place on tribal land. With respect to the exhaustion requirement, the Court held that "proper respect for tribal legal institutions requires that they be given a 'full opportunity' to consider the issues before them and 'to rectify any errors.'" *Id.* at 16, 107 S.Ct. at 977 (quoting *National Farmers*, 471 U.S. at 857, 105 S.Ct. at 2454). Because "the federal policy of promoting tribal self-government encompasses the development of the entire tribal court system . . . exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts." *Id.* at 16-17, 107 S.Ct. at 977. Consequently, federal court should

not intervene until the tribal courts have had a full opportunity to evaluate jurisdiction. *Id.* at 17, 107 S.Ct. at 977.

The precise question we address is not whether the Navajo courts have jurisdiction over the claims brought by the Tribal Claimants, but whether the Price-Anderson Act so obviously preempts tribal jurisdiction that an action in tribal court "would be patently violative of express jurisdictional prohibitions," and that abstention in favor of tribal exhaustion is inappropriate. *National Farmers,* 471 U.S. at 856 n. 21, 105 S.Ct. at 2454 n. 21. A substantial showing must be made by the party seeking to invoke this exception to the tribal exhaustion rule. *See Iowa Mut.,* 480 U.S. at 19 n. 12, 107 S.Ct. at 978 n. 12 (party's assertion that "tribal court jurisdiction over outsiders 'is questionable at best,'" insufficient to defeat the tribal exhaustion requirement). In fact, tribal courts rarely lose the first opportunity to determine jurisdiction because of an "express jurisdictional prohibition." Cases in which tribal courts are not given the first opportunity to determine their jurisdiction typically involve situations where the federal court has exclusive jurisdiction, *see Blue Legs v. Bureau of Indian Affairs,* 867 F.2d 1094, 1097-98 (8th Cir. 1989), or where tribal jurisdiction is foreclosed by sovereign immunity, *see United States v. Yakima Tribal Court,* 806 F.2d 853, 860-61 (9th Cir. 1986).

Kerr-McGee makes two tightly interwoven arguments in support of its position that Price-Anderson contains an "express prohibition" on tribal court jurisdiction despite the absence of statutory language explicitly addressing tribal fora. First, Kerr-McGee notes that 1988 amendments to Price-Anderson create specific procedures for adjudicating nuclear torts in federal court, and provide for an absolute right of removal to federal court. These procedures were explicitly designed to consolidate jurisdiction over claims arising from a nuclear incident in a single federal forum. Allowing

jurisdiction to arise in "any one of a patchwork of tribal judicial entities that exist throughout the West," Appellant's Br. at 19, would run counter to the express purposes of the Act as amended in 1988. Thus, the Price-Anderson Act and its amendments have expressly provided for exclusive federal court jurisdiction in this case, and the tribal court's assertion of authority is "patently violative of express jurisdictional prohibitions." *National Farmers*, 471 U.S. at 857 n. 21, 105 S.Ct. at 2454 n. 21. Second, even if we do not read the Price-Anderson Act amendments to create exclusive federal court jurisdiction, Kerr-McGee claims that because the federal government has preempted the entire field of nuclear torts, tribal jurisdiction, whether regulatory or adjudicatory, will not lie unless specifically provided for by statute. Under either argument, Kerr-McGee asserts jurisdiction is indirectly but expressly prohibited.

The Tribal Claimants dispute Kerr-McGee's construction of the law. They argue that even if federal regulation has limited tribal regulatory authority over Kerr-McGee's uranium milling, that does not imply adjudicatory preemption in the circumstances of this case. Given Price-Anderson's silence, civil jurisdiction over the activities of non-Indians on reservation land should be presumed to lie with the tribal court even if Congress has chosen to federalize the substantive law governing those activities. That presumption could be overcome, but only by an express statement removing tribal court adjudicatory authority, and Price-Anderson contains no such statement. Alternatively, plaintiffs contend that Price-Anderson does not apply to this case at all because Kerr-McGee does not have an indemnity agreement with the federal government. To assess these various competing arguments, we turn to the genesis and development of the Price-Anderson "system" governing nuclear torts, and determine how far down the road of exclusive federal court jurisdiction Congress went in the Price-Anderson 1988 amendments.

B

The Atomic Energy Act (AEA) was created in 1954 to facilitate a transition from a federal government monopoly over the production and use of atomic materials to a regime in which private industry also would have a role in their production and use. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n,* 461 U.S. 190, 206-07, 103 S.Ct. 1713, 1723-24, 75 L.Ed.2d 752 (1983). Limiting the states' role in regulating atomic energy, Congress granted a federal agency, the Atomic Energy Commission (later the Nuclear Regulatory Commission), "exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession, and use of nuclear materials." *Id.* at 207, 103 S.Ct. at 1724. Hazards arising from atomic radiation were made a particularly federal concern, as to which the states had no authority to regulate. *Id.* at 209-10, 103 S.Ct. at 1725. Accordingly, with very few exceptions, state attempts to regulate in this area are preempted.

In 1957, Congress amended the AEA through the Price-Anderson Act (PAA), creating specific protections from tort liability for the nuclear industry. *See Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 251, 104 S.Ct. 615, 623, 78 L.Ed.2d 443 (1984). The PAA contains three distinct elements: (1) an aggregate ceiling on the liability for nuclear tort claims; (2) a "channeling of liability" to protect private entities from liability for their indirect participation in atomic development; and (3) an indemnification program, through which the federal government would require private insurance coverage to a certain level, and pay public liability claims above that amount, up to the liability ceiling created by the PAA. *In re TMI Litig. Cases Consol. II ("TMI II"),* 940 F.2d 832, 852 (3d Cir. 1991). While the PAA specifically made nuclear industry liability a federal concern, Congress initially chose

not to create a specific federal cause of action for nuclear torts; rather, the legislative history suggests that Congress was content to allow liability to be dictated by existing causes of action. *Silkwood,* 464 U.S. at 252-55, 104 S.Ct. at 623-25 (finding state punitive damages statute not preempted by the PAA).

The PAA has been amended several times, further refining the relationship between federal and state roles regarding nuclear torts, and the protections to be afforded private industry and the general public. Recent amendments, the Price Anderson Amendments Act of 1988, Pub.L. No. 100-408, 102 Stat. 1066 (1988) ("1988 Amendments"), which is the law at issue in this case, arose out of congressional understanding that the Price-Anderson system "provides persons seeking compensation for injuries as a result of a nuclear incident with significant advantages over the procedures and standards for recovery that might otherwise be applicable under State tort law.... [It] also provides a mechanism whereby the federal government can continue to encourage private sector participation in the beneficial uses of nuclear materials." S.Rep. No. 100-218, at 4 (1988). While not otherwise superseding the decision in *Silkwood,* the 1988 Amendments can be read in part as a congressional response to the result in *Silkwood* suggesting that the PAA never preempts state punitive damages awards. *TMI II*, 940 F.2d at 870 n. 3 (Scirica, J., concurring).

The 1988 Amendments expand federal jurisdiction over claims arising out of a "nuclear incident":

> With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the nuclear incident takes place . . . shall have *original jurisdiction* without regard to the citizenship of any party or the amount in

> controversy. Upon motion of the defendant or of the Commission, or the Secretary, as appropriate, any such action pending in any State court (including any such action pending [on the date of the 1988 Amendments]) or United States district court shall be removed or transferred to the United States district court having venue under this subsection.

42 U.S.C. § 2210(n)(2) (emphasis added). A "public liability action" is defined as "any suit asserting public liability." 42 U.S.C. § 2014(hh). Moreover, a public liability action "shall be deemed to be an action arising under section 2210 of this title [which creates a federal forum for suit]." *Id.* "Public liability" is sweeping: it encompasses *any* legal liability from "nuclear incidents," which in turn are defined in § 2014(q) to include any occurrence causing any personal or property damage arising out of the toxic, radioactive, explosive or other hazardous properties of atomic or byproduct materials. 42 U.S.C. § 2014(w).

The 1988 Amendments also create other federal rules with respect to public liability actions. Section 2210(n)(3) creates specific federal court procedures for dealing with a mass nuclear incident, including a mechanism to fashion a caseload management panel empowered to consolidate claims and develop procedures for their resolution. 42 U.S.C. § 2201(n)(3). While creating a federal cause of action over "nuclear incidents," the 1988 Amendments explicitly state that the substantive rules of decision for a public liability action "shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section." 42 U.S.C. § 2014(hh).

From this framework, it is apparent that Congress intended to expand federal control over safety and liability

issues involving the nuclear industry, particularly with respect to the role of federal courts in resolving liability. Prior to 1988, only a subclass of nuclear incidents, "extraordinary nuclear occurrences," triggered absolute federal rights of removal. *TMI II*, 940 F.2d at 853 n. 18. Kerr-McGee notes that defendants may now choose to have federal courts, rather than state, determine liability even though the substantive rule of decision may derive from state law, and argues from that proposition that, together with the creation of specific procedural mechanisms in federal courts to deal with complex or extensive nuclear incident litigation, the framework suggests a congressional interest in allowing litigants to make federal courts *the* home for such litigation.

The Tribunal Claimants first contend that we need not even consider the jurisdictional provisions of the 1988 Amendments. Citing *Silkwood*, they assert that the PAA system simply does not apply to this case because Kerr-McGee does not have an indemnity agreement with the federal government. This argument misreads *Silkwood*, which simply refused to apply the indemnification provisions of the PAA to the claim in that case because the defendant lacked the necessary indemnity agreement. *Silkwood*, 464 U.S. at 252 n. 12, 104 S.Ct. at 623 n. 12. Nothing in *Silkwood* suggests that the absence of an indemnity agreement makes the PAA's jurisdictional provisions inapplicable. Furthermore, as quoted above, the jurisdictional provisions of the PAA, 42 U.S.C. §§ 2014(w), 2210(n), as amended by the 1988 Amendments, appear broad enough to create a federal forum for any tort claim even remotely involving atomic energy production. The PAA on its face provides the sole remedy for the torts alleged in this case, and we must therefore consider its jurisdictional provisions.

1

Kerr-McGee argues that the PAA's jurisdictional and liability provisions strongly suggest Congress intended something very close to exclusive jurisdiction: under the 1988 Amendments, the plaintiff to a nuclear incident claim can bring her case in federal court if she wants, and the defendant has the absolute right of removal from state court. As the legislative history of the 1988 Amendments indicates, this jurisdictional framework was intended to prevent inefficient fragmentation and inconsistent resolution of nuclear tort claims by providing for their consolidation in federal court. *See O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1102 (7th Cir. 1994) (citing S. Rep. No. 100-218, at 13; H.R. Rep. No. 100-104, pt. 3, at 30 (1988)). Yet, the Tribal Claimants correctly point out that the 1988 Amendments do not explicitly create *exclusive* federal court jurisdiction over nuclear incident litigation, as Congress has created, for example, in other contexts. *See, e.g., Blue Legs*, 867 F.2d at 1098 ("'Any action [under the relevant RCRA provision] *shall* be brought in the district court for the district in which the alleged violation occurred.'" (quoting 42 U.S.C. § 6972(a)) (emphasis added)). That said, Congress may have intended the option of voluntary removal -- which it did not provide in RCRA -- because the federal substantive rule of decision is still based in part on state law. *See* 42 U.S.C. § 2014(hh). It could thus be argued that state courts are left with jurisdiction not for federalism-driven comity reasons, but rather for efficiency reasons. The argument pressed by Kerr-McGee, that there exists a jurisdictional prohibition on all forums not mentioned in the 1988 Amendments, has some force.

In the end, however, we are not persuaded that the PAA regime *expressly* prohibits the exercise of tribal jurisdiction. The PAA does not include removal from tribal courts in its jurisdictional grant, and we are unwilling to speculate on what

Congress might have done with public liability actions commenced in the tribal courts. We cannot conclude that the 1988 Amendments created an exclusive enclave of federal adjudicatory control such that tribal courts lack jurisdiction to decide PAA claims, even those arising out of torts against tribal members on the reservation.[2/] *Becenti v. Vigil*, 902 F.2d 777 (10th Cir. 1990), is instructive. There, we held that the federal removal statute for claims against federal officers, 28 U.S.C. § 1442(a)(1), does not authorize removal from tribal courts. *Id.* at 780. The rationale for the removal statute, forbidding federal officers from being forced to answer for their conduct in any but a federal forum, mirrors the PAA's interest in allowing any party to a nuclear incident to take advantage of the federal forum. While *Becenti* asks whether a statute conferring jurisdiction on federal courts for certain claims filed first in state court also includes jurisdiction for similar claims filed first in tribal court, here we face the question of whether a statute that almost completely consolidates state court jurisdiction in federal courts should be read to strip jurisdiction from tribal courts as well. We follow the rationale of *Becenti* and conclude that federal jurisdiction grants are read parsimoniously to elide collision with tribal court jurisdiction. Simply put, "exclusive jurisdiction" is not conferred unless conferred explicitly.

[2/] Kerr-McGee seizes on language from *Smith v. General Electric Co.*, 938 F. Supp. 70, 75 (D. Mass. 1996), a district court case it brought to our attention after oral argument in this case. *Smith* states that the 1988 Amendments "created a jurisprudential curiosity, an action grounded in state law committed to the exclusive jurisdiction of the federal courts." *Id.* *Smith*, however, does not address the issue of tribal jurisdiction and cannot be read to speak to the question presented here.

Once we conclude that the PAA's jurisdictional provisions do not create exclusive federal court jurisdiction over nuclear incidents, the Tribal Claimants urge us to apply the basic jurisdictional presumption of *Iowa Mutual*, namely that tribal civil jurisdiction over "activities of non-Indians on reservation lands ... presumptively lies in the tribal courts unless affirmatively limited by a specific treaty or provision or federal statute." *Iowa Mut.*, at 18, 107 S.Ct. at 977 (citing *Montana*, 450 U.S. at 565-66, 101 S.Ct. at 1258-59) (further citations omitted). "'Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence ... is that the sovereign power ... remains intact.'" *Id.* (quoting *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 148 n. 14, 102 S.Ct. 894, 907 n. 14, 71 L.Ed.2d 21 (1982)). Noting the PAA's silence with respect to tribal court jurisdiction, the Tribal Claimants contend that we must presume the Navajo courts retain jurisdiction to adjudicate the tort claims. Certainly, they argue, statutory silence cannot be converted into an "express jurisdictional prohibition" on the exercise of tribal adjudicatory authority.

Relying primarily on *State of Montana v. United States,* 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493, Kerr-McGee urges a different presumption from silence in cases where Congress has comprehensively regulated the field. Kerr-McGee suggests that the *Iowa Mutual* presumption from silence does not apply in cases controlled by the PAA, because tribal adjudicatory power over such claims lies "beyond what is necessary to protect tribal self-government or to control internal relations ... and so cannot so survive without express congressional delegation." *Montana,* 450 U.S. at 564, 101 S.Ct. at 1258. Kerr-McGee cites to other cases in which tribes are presumed to lack jurisdiction over

nonmembers even without specific congressional language stripping tribal authority. In *South Dakota v. Bourland,* 508 U.S. 679, 113 S.Ct. 2309, 124 L.Ed.2d 606 (1993), the Court held that a tribe lacked regulatory authority to license nonmember hunters and fishermen for activity on reservation lands that the federal government was extensively regulating for public purposes. Four years earlier, in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation,* 492 U.S. 408, 109 S.Ct. 2994, 106 L.Ed.2d 343 (1989), the Court found that the tribe lacked authority to zone activities of nonmembers on open fee lands within the reservation. Kerr-McGee argues that the PAA so extensively regulates nuclear production and development, *see Pacific Gas & Elec.,* 461 U.S. at 206-07, 103 S.Ct. at 1723-24, that, as in *Montana, Brendale, and Bourland,* whatever inherent sovereignty the tribe may have originally enjoyed in this area has been divested by congressional legislation. Thus, absent a specific grant of jurisdiction, tribal authority must be presumed absent.[3/]

The proper inference to be drawn from silence presents questions that might require reconciling two arguably

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[3/] Kerr-McGee also cites *UNC Resources, Inc. v. Benally,* 518 F. Supp. 1046 (D.Ariz. 1981) for the proposition that tribes lack jurisdiction to adjudicate claims falling within the scope of the Price-Anderson Act. This case is outdated, however, because it incorrectly predicts the outcome in *National Farmers,* extending the reasoning of *Oliphant* to civil cases (which *National Farmers* specifically refused to do). *Compare Benally,* 518 F.Supp. at 1051 *with National Farmers,* 471 U.S. at 856, 105 S.Ct. at 2454. *Benally* also asserted that tribal jurisdiction "conflicts with the superior federal interest in regulating the production of nuclear power." *Id.* at 1052. Considering that the *Benally* court improperly weighed the tribal court's interest, its discussion of the federal interest in Price-Anderson Act actions must be discounted.

divergent strands of caselaw.[4] This is a different issue, and the difficulty itself belies Kerr-McGee's assertion that tribal authority here would be "patently violative of express jurisdictional prohibitions." *National Farmers*, 471 U.S. at 856 n. 21, 105 S.Ct. at 2454 n. 21.[5] *Strate v. A-1*

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[4] On this point, the recently issued Supreme Court opinion in *Strate v. A-1 Contractors*, ___ U.S. ____, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997), is instructive. Reviewing *Strate*, this panel invited the parties to submit supplementary briefs on its significance to this case. In *Strate*, the Supreme Court found that, absent a treaty or statute, a tribe lacked jurisdiction to adjudicate a dispute between nonmembers of the tribe arising out of an automobile accident occurring on a state highway. *Id.* at ___, 117 S.Ct. at 1407-08. Relying principally on *Montana*, the Court held that with respect to lands over which the tribe had ceded sovereign authority, tribal jurisdiction is substantially limited. *Id.* at ____, 117 S.Ct. at 1413. After carefully reviewing *Strate*, we conclude it is of limited usefulness in our case. Kerr-McGee's alleged torts did not occur on lands over which the tribe has ceded authority and control to another sovereign for an indefinite period. Here, the lease was to a private entity and for a finite period. The Supreme Court simply has not spoken to such a situation. *See id.* at ___, 117 S.Ct. at 1408 ("We express no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation.")

[5] In support of its contention that an "express jurisdictional prohibition" need not be quite "express," Kerr-McGee cites *Lower Brule Construction v. Sheesley's Plumbing*, 84 B.R. 638 (D.S.D. 1988). There, the district court, citing *Oliphant*, held that tribal exhaustion was not necessary for an adversary proceeding in bankruptcy, even if a body of bankruptcy law existed in tribal courts. This case is notable because it appears that the underlying action (involving dishonor of a note) was originally commenced in state court, and federal courts do not constitute the exclusive forum for adjudicating "non-core" proceedings instituted before the filing of the bankruptcy petition. *See* 28 U.S.C. § 157(b)(4); *In re Colorado Energy Supply, Inc.*, 728 F.2d 1283, 1285-86 (10th Cir. 1984). Thus, *Lower Brule* could stand for the proposition that tribal exhaustion is not necessary in areas where a federal procedure predominates. However, we find *Lower Brule* conclusory and unpersuasive -- it assumes without analysis

(continued...)

Contractors, ___ U.S. ___, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997), relied on by Kerr-McGee, is not a tribal exhaustion case; there, the federal plaintiffs first challenged tribal jurisdiction in the tribal courts. *See Strate*, at ___, 117 S.Ct. at 1408. Thus, the federal court never sought to identify an "express jurisdictional prohibition," but rather was in the position to address whether tribal adjudicatory power remains over civil disputes involving nonmembers on state highways within the reservation. By asking us to reach the merits of its jurisdictional challenge before it has run its course in the tribal courts, Kerr-McGee ignores the important congressional interest advanced by the tribal exhaustion rule.[6/]

Ultimately, this case requires an attempt to accommodate two independent and important congressional concerns: comity interests flowing from tribal sovereignty and nuclear energy regulation. Though a close question, we cannot conclude that the 1988 Amendments, or the PAA's scope generally, create an "*express* prohibition" to tribal court

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[5/](...continued)
that a tribe has no governmental interest in a contract between the debtor and the tribe regarding a tribal housing project on the tribe's reservation. Moreover, it appears that the district court improperly melded the question of an express jurisdictional prohibition with the recognition of comity concerns.

[6/] Kerr-McGee, in its supplementary brief, points to the statement in *Strate* that "[a]s to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Strate*, ___ U.S. at _____, 117 S.Ct. at 1413. Kerr-McGee suggests that no adjudicative jurisdiction can exist in the Navajo tribal courts because the PAA preempts all tribal regulatory jurisdiction. Yet, even if the Supreme Court's statement can be read outside of its concern for tribal jurisdiction over non-Indian fee lands, the PAA is unclear on the extent to which state (or tribal) law may inform the issue of a nuclear tortfeasor's liability. Pursuant to the tribal exhaustion rule, this question should first be addressed in tribal court.

jurisdiction. Congress intended to control where and how nuclear incident litigation is to take place, but did not take the next step of specifically divesting tribal courts of jurisdiction. While the precise scope of retained tribal jurisdiction in this case is subject to reasonable debate, tribal adjudicatory authority over this nuclear incident is not "patently violative of an express jurisdictional prohibition."

COMITY

The tribal exhaustion requirement created by *National Farmers* is based on comity concerns for Indian tribes in maintaining their remaining sovereignty. *National Farmers* recognizes that three specific interests are advanced by proper application of the rule: (1) furthering congressional policy of supporting tribal self-government; (2) promoting the orderly administration of justice by allowing a full record to be developed in the tribal court; and (3) obtaining the benefit of tribal expertise if further review becomes necessary. *National Farmers*, 471 U.S. at 856-57, 105 S.Ct. at 2454. If, as in this case, none of the *National Farmers* exceptions is present, the court must then make an inquiry whether to abstain based on these concerns. So long as the policies behind the tribal exhaustion rule are served by its application, "comity requires the parties to exhaust their tribal remedies before presenting their dispute to the district court." *Zah*, 5 F.3d at 1378.

We have taken a strict view of the tribal exhaustion rule and have held that "federal courts should abstain when a suit sufficiently implicates Indian sovereignty or other important interests." *Pittsburgh & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1542 (10th Cir. 1995). As the Tribal Claimants correctly assert, this court at times abstains without making a detailed comity analysis, holding that "when the dispute is a 'reservation affair' there is no discretion not to defer." *Zah*, 5 F.3d at 1378 (citing *Crawford v. Genuine*

Parts Co., 947 F.2d 1405, 1408 (9th Cir. 1991) (accidents on the reservation involving tribal members "arises on the reservation" within meaning of *National Farmers* presumptive tribal jurisdiction)). When the activity at issue arises on the reservation, comity concerns "almost always dictate that the parties exhaust their tribal remedies before resorting to the federal forum." *Id.* Conversely, "[w]hen the dispute involves non-Indian activity occurring outside the reservation ... the policies behind the tribal exhaustion rule are not so obviously served. Under these circumstances, we must depend on the district courts to examine assiduously the *National Farmers* factors in determining whether comity requires the parties to exhaust their tribal remedies before presenting their dispute to the federal courts." *Id.; United States v. Tsosie*, 92 F.3d 1037, 1042-43 (10th Cir. 1996) (same).

Here, the Tribal Claimants suggest that we need not even weigh the comity factors because of the nature of the underlying action. We agree that strong tribal interests are implicated by these claims. The mill that allegedly produced the toxic and radioactive waste was located on the reservation pursuant to a lease with the tribe, and the alleged victims of the tort are tribal members residing on the reservation. The tribal nexus is strong, as is the interest of the tribe as a sovereign in protecting and vindicating the rights of its residents, as well as its interest as lessor of the land for the mill. Yet, Kerr-McGee's argument that this is not a classic "reservation affair" has some force. Nuclear production is of national interest, the mill sold its entire production to the federal government, and the orderly administration of claims arising out of the United States' atomic energy and weapons program implicates concerns far beyond the borders of the reservation. While the district court appeared to consider the tort claims "a reservation affair" and therefore reviewed the comity factors only briefly, the unique concerns implicated in this case deserve a more thorough comity analysis.

In this case, the first factor most strongly supports abstention. If courts are to honor Congress's commitment to tribal self-government, tribal courts must be allowed to exercise their authority over mass toxic tort claims occurring within their jurisdiction and alleging injury to tribal members, absent overwhelming countervailing concerns. Even *Strate* and *Montana*, cases that curtailed tribal authority over non-Indians, recognized that tribes retain a core sovereign interest in protecting the health and welfare of the tribe such that they may regulate non-Indians on all lands within the reservation. *Strate*, ___ U.S. at ___, 117 S.Ct. at 1415; *Montana*, 450 U.S. at 566, 101 S.Ct. at 1258-59. This appears to be such a case.

The second factor, the orderly administration of justice, does not so obviously cut in favor of tribal exhaustion. The PAA, contemplating mass tort litigation arising from a nuclear incident, creates specific procedures to facilitate and consolidate adjudication of such claims. Though *National Farmers* recognizes that allowing tribal courts to make initial jurisdictional determinations minimizes a potential "procedural nightmare," it is not clear that such a justification holds here. Because of *Iowa Mutual's* expansive abstention, we are required to allow full exhaustion of tribal court litigation, potentially including litigation of the merits. Given Congress's authorization of specific procedures for dealing with these cases in federal court, abstaining in favor of the tribal court hardly seems to minimize the prospect of a "procedural nightmare."[7] It is difficult to balance the loss

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[7] Currently, there appears to be litigation involving Cyprus Foote's Uranium mines in at least two separate Navajo tribal courts, as well as in the federal courts of the Ninth and Tenth Circuits. *See Farley v. Kerr-McGee*, No. SR-CV-103-95 (Navajo D. Ct. District of Shiprock); *Richards v. Texas Zinc*, KY-CV-002-95 (Navajo D. Ct., District of Kayenta); *Kerr-*

(continued...)

of specific procedures developed by the PAA for case consolidation and case management of cases such as these against the full record that will be developed in tribal courts by virtue of federal court abstention.

The third comity consideration, obtaining the benefit of tribal court expertise may be of value in this case. 42 U.S.C. § 2104(hh) requires that the substantive rules of decision in such actions are to be derived from the "law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section." At oral argument, counsel for the Tribal Claimants argued that the substantive rule of decision in this case should be derived from Navajo tribal law.

Upon reviewing the comity factors, we conclude that abstention is appropriate. Kerr-McGee contends that it is inappropriate to analyze the tribal court jurisdiction question and the comity factors separately. Specifically, it argues that our comity analysis must consider the strong role afforded federal courts in resolving Price-Anderson suits. We disagree. The *National Farmers* framework does not accord countervailing federal concerns a place in the comity analysis. Consideration of federal jurisdictional concerns is only appropriate in the context of determining whether to engage in the comity analysis at all.

It does not serve Congress's interest in promoting development of tribal courts, *see Iowa Mutual*, 480 U.S. at 19, 107 S.Ct. at 978, to second-guess the jurisdictional

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[7]/(...continued)
McGee v. Farley, (D.N.M.); *El Paso Natural Gas v. Neztsosie*, No. 96-49/ 96-1524 (D. Ariz.). The Price-Anderson Act has instituted procedures specifically designed to avoid this sort of atomized litigation and the "procedural nightmares" attendant to it.

determinations of the Navajo district court before the tribal appellate process has run its course. The district court's judgment is **AFFIRMED.**

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CIV 95-0438 MV

Filed June 8, 1995

KERR-McGEE CORPORATION,
CYPRUS FOOTE MINERAL
CORPORATION and RIO ALGOM, LTD.,

Plaintiffs,

vs.

KEE TOM FARLEY, Individually
and on behalf of the Estate of
LUCY K. FARLEY, CARMELITA FARLEY,
JOE and HAROLD KADY, SR.,
Individually and on behalf of the
Estate of JULIA MAE KADY,

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER came on for consideration of the Plaintiff's Complaint for Preliminary Injunction and Declaratory Judgment, filed April 21, 1995. Plaintiffs ask

this Court to permanently enjoin Navajo Tribal Court proceedings and declare that the Navajo Tribal Court is without jurisdiction to hear and adjudicate any of the claims asserted against them in tribal court.

The Court has reviewed the Complaint, the Plaintiffs' Motion for Preliminary Injunction, filed April 21, 1995, and the Responsive pleadings and finds that the tribal abstention doctrine applies to this case and requires this Court to abstain from further action in this matter until the Tribal Court has ruled on the jurisdictional question.

FACTUAL BACKGROUND

On January 12, 1995, three members of the Navajo tribe filed suit in Navajo Tribal Court against the above named Plaintiff Corporations which allegedly operated the Shiprock Mill, a uranium processing mill located on the Navajo Reservation, on leased tribal land.[1/] The Tribal Court complaint seeks damages for alleged negligence and wrongful death arising out of the Corporations' alleged operation of the Shiprock Mill in violation of tribal law. The Corporations have not answered the tribal court complaint nor otherwise appeared in the Navajo Tribal Court on this matter; instead they filed this action.

Here, the Corporations assert that the Price-Anderson Act, 42 U.S.C. § 2011, et seq., contains an "express jurisdictional prohibition" to tribal court suits involving nuclear torts, thereby depriving tribal courts of jurisdiction

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1/ In 1953, Kerr-McGee Oil Industries Corporation leased tribal land near Shiprock, New Mexico, and entered into a contract with the Atomic Energy Commission to construct a uranium mill. Compl. Para. 2.1.2.

and relieving them of any duty to exhaust tribal court remedies.

DISCUSSION

The tribal exhaustion requirement, enunciated by the Supreme Court in 1985, is based on considerations of comity and the long-standing policy of promoting tribal self-government and self-determination. *National Farmers Union Ins. Co. & Lodge Grass Schl. Dist. v. Crow Tribe of Indians,* 471 U.S. 845 (1985). In *National*, the Court held that tribal court remedies should be exhausted before the matter is heard in federal court. *Id.* The Court explained that the existence and extent of a tribal court's jurisdiction requires a careful examination of tribal sovereignty and found "that examination should be conducted in the first instance in the Tribal Court." *Id.* at 856.

It is clear that the exhaustion doctrine does not strip this Court of jurisdiction over this matter as this Court retains both federal question and diversity jurisdiction. *See National Farmers*, 471 U.S. 845; *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). It is equally clear that Supreme Court precedent requires, not as a jurisdictional prerequisite, but as a matter of respect, that this Court allow the tribal court to first hear and determine the challenge to its jurisdiction. *Id.*

"Proper respect for tribal legal institutions requires that they be given a full opportunity to consider the issues before them and to rectify any errors." *Iowa Mutual*, 480 U.S. at 16.

Tribal exhaustion not only promotes tribal self-government and self-determination, it promotes judicial efficiency:

> The orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed....exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.

National Farmers, 471 U.S. at 856.

An exception to the tribal exhaustion requirement exists where tribal court jurisdiction "is patently violative of an express jurisdictional prohibition". *Id.* at 857 n. 21.[2/]

Plaintiffs urge that this exception applies here and relieves this Court of any obligation to exercise comity and defer to the Navajo Tribal Court to first examine the jurisdictional challenge they pose. They emphatically argue that an express jurisdictional prohibition can be found in the language and legislative history of the amended-Price-Anderson Act. Plaintiffs' arguments fail because they fail to reconcile their theories with Indian Sovereignty principles. Indeed, they ignore them.

Plaintiffs urge that an express jurisdictional prohibition exists because through the Price-Anderson Act, and its amendments, the federal government has preempted the nuclear regulatory field. They urge that in this comprehensive regulatory "system" lies the exclusive method for resolving

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[2/] The Court recognizes there are two other exceptions to tribal exhaustion which are not at issue here.

nuclear tort claims, preempting any conflicting state law or regulation, and allowing for an absolute right of removal from state to federal court.

Plaintiffs err in assuming that tribes are to be treated as states. Indian tribes and the federal government are dual sovereigns. Tribes have a unique relationship with the federal government and occupy a unique status under the law. *See National Farmers*, 471 U.S. at 851. As Chief Justice John Marshall observed in the historical case of *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1931): 'The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence...The relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else. *Id.* at 16.

The federal-tribal relationship is distinct in that it involves special trust obligations requiring the United States to adhere strictly to fiduciary standards in its dealings with Indians. F. Cohen, *Handbook on Federal Indian Law*, 207 (1982).

Accordingly, in its examination of the tribal exhaustion doctrine, this circuit has distinguished between federal-state jurisdiction and federal-tribal jurisdiction:

> As in cases raising comity concerns regarding federal-state jurisdiction, comity concerns in federal-tribal civil jurisdiction, arise out of mutual respect between sovereigns. In the realm of federal-tribal jurisdiction, however, Congress has expressed *an additional interest in promoting the development of tribal sovereignty*. The Supreme Court has recognized this congressional intent and assiduously advocated federal abstention in favor of tribal courts.

Smith v. Moffett, 947 F.2d 442, 445 (10th Cir. 1991) (emphasis added).

Plaintiffs incorrectly assert the Navajo Nation has no jurisdiction over this matter because the power to hear nuclear torts was not expressly delegated to them in Price-Anderson. This position turns the historic tribal sovereignty analysis on its head. It is clearly established law that Indian tribes do not derive their sovereign powers from congressional delegation. Rather, tribal sovereignty is inherent, and tribes retain "attributes of sovereignty over both their members and their territory, *to the extent that sovereignty has not been withdrawn by federal statute or treaty*." *Iowa Mutual*, 480 U.S. at 14 (emphasis added); *See also United States v. Wheeler*, 435 U.S. 313, 323 (1978) (tribes possess aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependant status).

Tribal courts play a vital role in tribal self-government. *Id.* With respect to tribal court jurisdiction, civil jurisdiction over such activities *presumptively* lies in the tribal court unless *affirmatively limited* by a specific treaty provision or federal statute. *Id.* at 18; *Smith*, 947 F.2d at 444 (emphasis added).

The Price-Anderson Act and its amendments are devoid of any mention of "Indians," "tribes," or "tribal-court jurisdiction." In *Iowa Mutual*, the Supreme Court refused to infer that Congress, in enacting the diversity statute, 28 U.S.C. §1332, intended to limit tribal sovereignty, in the absence of express language to that effect:

> The diversity statute, 28 U.S.C. §1332, makes no reference to Indians and nothing in the legislative history suggests any intent to render inoperative the established federal policy promoting tribal self-government.

480 U.S. at 17. The Court reasoned that because tribes retain all inherent attributes of sovereignty that have not been expressly divested by the federal government, "the proper inference from silence . . . is the sovereign power . . . remains intact." *Iowa Mutual*, 480 U.S. at 18 (*citing Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 149, n.14 (1982).[3/]

Interpreting silence in favor of Indians is consistent with the trust relationship existing between the federal government and the tribes. Since Congress is exercising a trust responsibility when dealing with Indians, courts presume that Congress' intent toward them is benevolent and have developed cannons of construction that treaties and other federal action should, when possible, be read as protecting Indian rights and in a manner favorable to Indians. Cohen, *Handbook on Federal Indian Law* at 221. Once powers of tribal self-government or other Indian rights are shown to exist, subsequent federal action which might arguably abridge them is construed narrowly in favor of retaining Indian rights. *Id.* at 224.

Plaintiffs ignore these principles and insist that courts, including the Supreme Court, have inferred "an express jurisdictional prohibition" based on federal preemption principles even absent express language to that effect. Plaintiffs cite several cases in support of this contention that are inapplicable because they do not involve Indian tribes and,

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[3/] Plaintiffs cite *Iowa Mutual* for the general proposition that courts look to legislative intent to find express jurisdictional prohibitions. Plaintiffs ignore the significant fact that no legislative intent to prohibit jurisdiction was found in *Iowa Mutual*, where tribes were not even mentioned in the statute.

therefore, do not address tribal sovereignty concerns.[4/] (*See* Pls.' Br. in Opp'n to Defs.' Mot. to Dismiss at 10-11, n.4).

The cases cited by Plaintiffs which do involve Indian tribes are inapposite because they involved congressional legislation, which in addition to addressing jurisdiction, expressly addressed tribes. Plaintiffs refer to *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), where the Supreme Court found that legislation granting the federal government jurisdiction to try non-Indians for criminal offenses committed in Indian Country, implicitly preempted tribal jurisdiction.

In creating the exhaustion requirement, *National Farmers* expressly rejected implying pre-emption in the civil context:

> If we were to apply the *Oliphant* rule here, it is plain that any exhaustion requirement would be completely foreclosed because federal courts would be the only forums for civil actions against non-Indians. For several reasons, however, the reasoning of *Oliphant* does not apply to this case.

471 U.S. at 854. The Court went on to explain that its determination in *Oliphant*, that Congress had preempted tribal jurisdiction, was based on the fact that Congress chose to

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[4/] A few of the cases relied on by Plaintiffs involve the Price Anderson-Act but are inapplicable because they address federal-state jurisdictional issues involved in Price-Anderson and do not address tribes or tribal sovereignty issues. Plaintiffs cite to *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994) and *In re TMI Litigation Cases Consol. II*, 940 F.2d 832 (3d Cir. 1991), as creating an express jurisdictional prohibition by interpreting Section 2218 of the Act as requiring that all cases from a nuclear incident be consolidated before a single federal district court.

enact legislation which implicitly limited tribal court jurisdiction by expressly granting federal courts criminal jurisdiction over offenses committed in Indian Country. *Id.* The Court further stated there was no comparable legislation in the civil context.[5/]

Here, Congress has not similarly acted to limit tribal court jurisdiction in Price-Anderson. *Oliphant* involved congressional action specifically and expressly affecting Indian tribes. As stated earlier, the Price-Anderson Act does not mention Indian tribes. Plaintiffs' reliance on *Oliphant* ignores clear precedent and is clearly misplaced. The Supreme Court distinguished it and rejected it in the civil context.

Plaintiffs' reliance on *Blue Legs v. United States Bureau of Indian Affairs,* 867 F.2d 1094 (8th Cir. 1989), is also misplaced. In *Blue Legs*, the Eighth Circuit held that federal courts had exclusive jurisdiction over suits under the Resource Conservation and Recovery Act, (RCRA) 42 U.S.C. § 6901 et. seq. and, therefore, did not require exhaustion of tribal remedies. Again, RCRA, unlike the Price-Anderson Act,

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[5/] Additionally, the Supreme Court explained that its decision in *Oliphant* was also based on historical distinctions between the way criminal and civil jurisdiction was addressed in tribal treaties: where criminal jurisdiction was sometimes ceded, civil jurisdiction was not. *See* 471 U.S. at 854-55, n. 17 (*quoting* Cohen, *Handbook of Federal Indian Law* at 253-54 ("In the civil field Congress has never enacted general legislation to supply a federal or state forum for dispute between Indians and non-Indians in Indian country").

specifically dealt with Indian tribes and subjected them to suit, while mandating a federal forum.[6/]

Similar to *Oliphant*, the inference that the government had taken away tribal jurisdiction was based on language in the statute which expressly addressed Indians. Congressional intent to affect Indians in those cases was clear.

Plaintiffs cite no cases similar to the one before the Court, where a statute which makes no mention of "Indians" or "Indian tribes" has been construed to strip tribes of their sovereign powers.

As additional support for federal preemption, Plaintiffs assert that the nuclear industry is particularly tied to concerns of national security and, therefore, of greater federal concern than other contexts in which courts have tended to require a specific, enunciated limitation to tribal jurisdiction.[7/] It is undisputed that the nuclear industry poses unique security and safety issues that are appropriately addressed by federal legislation. However, the need to regulate and monitor the nuclear industry is not necessarily irreconcilable with long-

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[6/] In *Blue Legs*, members of the Oglala Sioux Tribe (Tribe) sued the Environmental Protection Agency, the Bureau of Indian Affairs, Indian Health Services and the tribe in federal court claiming that garbage dumps located on the reservation were maintained in violation of the Act. 867 F.2d 1094.

[7/] Moreover, Plaintiffs argument that federal courts have exclusive jurisdiction over Price-Anderson actions is belied by the fact that state courts have concurrent jurisdiction over Price Anderson actions. The Act provides an absolute right of removal to federal court, but does not mandate removal.

standing Indian Sovereignty principles, which have important, competing concerns of their own.[8/]

Finally, with respect to federal preemption, even assuming Price-Anderson is the only means of litigating nuclear torts, this does not establish that tribal courts are without jurisdiction to apply Price-Anderson. Whether such actions are required to be litigated under the Price-Anderson Act is not dispositive of the jurisdictional question.[9/]

Finally, Plaintiffs contend that this Court must separately weigh the three policy concerns behind the tribal exhaustion rule, as identified by the Supreme Court in *National Farmers*.[10/] This circuit has only required that these factors be separately addressed where the dispute involves non-Indian activity occurring outside the reservation. *Texaco v. Zah*, 5 F.3d 1374, 1378 (1993); *Pittsburgh and Midway Coal Mining*

[8/] To permit the judicial system of the Navajo Nation to hear a complaint filed by Navajo tribal members who claim they were injured as a result of the Corporations' operation of the Shiprock Mill in violation of tribal law does not jeopardize the security and safety concerns which prompted the Price Anderson Act and which underlie the Plaintiffs' pre-emption argument.

[9/] Indeed, the Court was persuaded by the detailed discussion in Plaintiffs' brief and in their oral presentation to the Court, at the May 26, 1995, hearing, that Price-Anderson may well be the applicable substantive law to be applied in nuclear tort cases. However, whatever the proper substantive law may be, it is separate and apart from the jurisdictional question.

[10/] (1) to further the congressional policy of supporting tribal self-government; (2) to promote the orderly administration of justice; and (3) to obtain the benefit of tribal expertise. *National Farmers*, 471 U.S. at 856-57.

Co. v. Watchman, 1995 WL 231635 (10th Cir. N.M.); *United States v. Tsosie*, 849 F. Supp. 768, 772 (D.N.M. 1994); *Atkinson Trading Co. v Navajo Nation*, 866 F. Supp. 506, 511 (D.N.M. 1994).

When the activity at issue arises on the reservation, these policies almost always dictate that the parties exhaust their tribal remedies before resorting to the federal forum. *Texaco*, 5 F.3d at 1378; *See also Crawford v. Genuine Parts Co.*, 947 F.2d 1405, 1408 (9th Cir. 1991) ("When the dispute is a reservation affair . . . there is no discretion not to defer"). Thus, this circuit has characterized the tribal exhaustion rule as "an inflexible bar to consideration of the merits of the petition by the federal court." *Id.* (*quoting Smith*, 947 F.2d at 445).

Only where a dispute involves off-reservation activity are the policies behind tribal exhaustion "not so obviously served" and under those circumstances this circuit looks to district courts to "examine assiduously the *National Farmers* factors in determining whether comity requires the parties to exhaust their tribal remedies before presenting their dispute to the federal courts." *Id.*

The Court was unpersuaded that it should ignore tribal sovereignty issues in this case and preclude the tribal court from jurisdiction and enjoin its proceedings on the basis of federal preemption principles and case law which are silent on tribal concerns.

Plaintiffs Rio Algom Unlimited, UMETCO Mineral Corporation and Union Carbide Corporation.

Plaintiffs Rio Algom Unlimited, UMETCO Mineral Corporation and Union Carbide Corporation urge that they are "outside the scope" of the tribal exhaustion doctrine because they have conducted no activity on Navajo tribal land and have no connection to any of the other defendants in the tribal action, to the Shiprock Mill or to any of its alleged operators or operations.

In order for this Court to determine the merits of these contentions, it would have to place the cart before the horse and circumvent the exhaustion requirement on arguments properly made in a Motion to Dismiss to the Court asserting jurisdiction. Moreover, this is a factual dispute which *National Farmers* expressly stated should be heard in the forum whose jurisdiction is being challenged. 461 U.S. at 856.[11/]

In addition, this circuit summarily rejected a similar argument in *Bank of Oklahoma v. Muscogee Nation*, 972 F.2d 1166, 1169 (1992). In *Muscogee*, the bank claimed there was not tribal court jurisdiction because the banking activity in question took place off tribal land. The court referred to *National Farmers* and Tenth Circuit case law on tribal exhaustion and stated: "this jurisdictional argument should first be heard in tribal court."

[11/] Congress' policy of supporting tribal self-government "favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the *factual* and legal basis for the challenge." *Id.* (emphasis added).

Defendants who feel they have been improperly brought into court routinely move for dismissal. However, insistent in their resistance to tribal authority, Plaintiffs creatively argue that the tribal exhaustion doctrine does not apply to them given their lack of any activity on the Navajo Reservation. This approach would effectively render the doctrine of tribal exhaustion and all its underlying concerns moot, as it would allow non-Indian defendants to side-step tribal courts altogether by raising their defenses or grounds for dismissal to a federal district court prior to ever answering in tribal court. The federal court ruling could essentially pull jurisdiction out from under the tribal courts' reach.

Contrary to their contentions, Plaintiffs Rio Algom, UMETCO Mineral and Union Carbide are no different from the other Corporations with respect to the tribal exhaustion requirement, regardless of their factual jurisdictional defense.[12/]

Tribal authority over activities of non-Indians on reservation lands is an important part of tribal sovereignty. *Iowa Mutual*, 480 U.S. at 18 (*citing Montana v. United States*, 450 U.S. 544). The Price-Anderson Act does not

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[12/] Plaintiff Rio Algom misconstrues *Pittsburgh and Midway Coal Mining Co. v. Watchman* in a supplemental brief filed, May 9, 1995. *Pittsburgh* involved a reservation boundary dispute where the application of the exhaustion doctrine depended on a district court's determination of what percentage of land at issue in that case constituted "Indian Country." The Tenth Circuit did not determine the issue but instead remanded the case back to the district court. The distinctions between *Pittsburgh* and *National Farmers* and *Iowa Mutual*, relied on by this Court, were expressly noted by this circuit in its opinion in *Smith*, 947 F.2d at 445 (citing an earlier decision of the same case). Contrary to Rio Algom's assertions, *Pittsburgh* supports abstention.

affirmatively limit tribal court jurisdiction. Although Congress has plenary power to define the jurisdiction of tribal courts, it did not exercise that power, when it drafted the Price-Anderson Act. *See Tsosie*, 849 F. Supp. at 773. The Act makes no reference to Indians and nothing in the legislative history suggests any intent to render inoperative the established policy promoting tribal self-government. *See Iowa Mutual,* 480 U.S. at 17.

Furthermore, it was by virtue of federal government contracts that nuclear mills were constructed and operated on the Navajo reservation. Congress is obviously aware of the possibility of nuclear torts occurring on tribal lands. To date it has not addressed tribal court jurisdiction over such matters. Be it intentional or an oversight, until Congress addresses the issue, this Court will not interpret its silence as "an express jurisdictional prohibition" to tribal court jurisdiction so as to render the exhaustion doctrine inapplicable. To do so would ignore important Congressional and judicial concerns regarding tribal sovereignty.

As a matter of respect to the Navajo Tribal Court, all proceedings in this Court are stayed until tribal court proceedings are exhausted.[13/]

s/Martha Vasquez
UNITED STATES DISTRICT JUDGE

[13/] Ultimately, this Court may determine whether the Tribe's decision, whatever it may be, is consistent with its sovereign authority or the Navajo Tribal Court could rule in Plaintiffs' favor and eliminate the need for any further action.

APPENDIX C

IN THE DISTRICT COURT OF THE NAVAJO NATION
JUDICIAL DISTRICT OF SHIPROCK, NEW MEXICO

KEE TOM FARLEY, et al.,	)	No. SR--CV--103--95
	)	
Plaintiffs,	)	
	)	
vs.	)	O R D E R
	)	
KERR McGEE, et al.,	)	
	)	
Defendants.	)	
	)	

THIS MATTER came on for consideration of the Defendant's Motion to Dismiss filed on June 05, 1995 which was heard on October 18, 1995. Defendants moved this Court to dismiss this action for lack of subject matter jurisdiction and failure to state a claim upon which this Court may grant relief. As grounds for dismissal, Defendants assert that maintenance of this action in this forum violates express requirements of a comprehensive federal law, the Price-Anderson Act 42 U.S.C. Section 2011 *et seq*.

Plaintiffs filed said complaint on January 12, 1995, seeking damages for wrongful death and injury allegedly resulting from exposure to vanadium and uranium processed at a uranium mill operated by Defendants in Shiprock, New Mexico. On April 26, 1995, Defendants filed a Complaint for

Preliminary Injunction and Declaratory Judgment in the United States District Court for the District of New Mexico (CIV95-0438-MV). Defendants requested the United States District Court to permanently enjoin Navajo Tribal proceedings and declare that the Navajo Tribal Court is without jurisdiction to hear and adjudicate any claims asserted against them in tribal court. Defendants argued that this case constitutes a "public liability" action that is, "any legal liability arising out of or resulting from a nuclear incident" and therefore; the Price Anderson Act applies to this case. Defendants further asserted that this Tribal Court does not have jurisdiction to resolve nuclear torts because the Price Anderson Act created a federal cause of action to resolve such disputes.

On June 8, 1995, U.S. District Judge Martha Vasquez, in a Memorandum Opinion And Order ruled that, in accordance with the tribal abstention doctrine, the U.S. District Court was required to abstain from further action in this matter until the Tribal Court has ruled on the question of jurisdiction. Defendants then filed a Motion to Dismiss in this Court that was heard on October 18, 1995.

Defendants are foreign corporations that operated a uranium processing mill in Shiprock, New Mexico from 1952 to 1973. The mill was located on tribal trust land within the territorial jurisdiction of the Navajo Nation. Plaintiffs are members of the Navajo Tribe who either worked at the uranium processing site and/or resided within the immediate area of the processing mill. Plaintiffs allege that the deceased, Lucy Farley and Julia Kady, died from exposure to vanadium and uranium processes and various radioactive substances and heavy metals. Plaintiffs are seeking damages for negligence

and wrongful death and other tort damages stemming from the alleged operation of the processing mill.

As grounds for dismissal, Defendants assert this Court cannot assert jurisdiction over nuclear torts allegedly committed by Defendants because the federal government has preempted the entire field of nuclear safety through Congressional enactment of the Price Anderson Act. Defendants contend that the Price Anderson Act expressly ceded limited power to the states and that no express delegation was granted to tribal courts and that none can be implied.

Secondly, Defendants argue that Congress created an exclusive method for resolving nuclear tort claims. To wit: the Price Anderson Act requires the filing of any suits involving injury from exposure to nuclear materials to be filed in federal courts or in state courts with absolute and unqualified right of removal to federal court. Defendants further allege no express delegation was granted to tribal courts and none can be implied. Finally, the Defendants argue that comity requires the tribal courts to defer to federal courts.

The arguments Defendants pose is fundamentally flawed because it fails to reconcile their theories with Indian Sovereignty principles as established by Federal Indian policy and United Supreme Court decisions. To determine whether this Court has subject matter jurisdiction, this Court is obligated to carefully examine the Price Anderson Act in light of inherent tribal sovereignty, relevant statutes, case law, and federal policy to determine whether this Court has jurisdiction.

INHERENT TRIBAL SOVEREIGNTY

The history of tribal self-government forms the present right of tribes to govern their members and territories. Although extensive preexisting tribal sovereignty has been limited by tribal inclusion with the United States, Tribal powers of self-government are recognized by the U.S. Constitution, federal legislation, treaties, U.S. Supreme Court decisions, and administrative practice. Such recognition is protected by the federal government to insure continued viability of Indian self-government insofar as governing powers have not been limited or extinguished. Indian Tribes are sovereign in that they are political self governing entities whose powers can be circumvented only by Congress. *U.S. v. Wheeler,* 435. U.S. 313, 323, 98 S Ct. 1079, 1086, 55 L Ed. 2d 303, 313 (1978). That is, a Tribe retains its sovereignty until Congress divests that sovereignty.

The most basic principle of Indian law is that those powers which are lawfully vested in an Indian Tribe are "inherent powers of a limited sovereignty which has never been extinguished" *Id.* at 322-323. Thus, Tribal powers are not delegated powers granted by express acts of Congress. Tribal powers that currently remain are those powers that tribes have always had and remain within the domain of the tribe. In *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978) the Supreme held that "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."

TRIBAL CIVIL JURISDICTION OVER NON-INDIANS

The Supreme Court in *Montana v. United States,* 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981) articulated the principle that underlies tribal court civil jurisdiction over non-Indians. The Crow tribe of Montana, by a tribal regulation sought to prohibit hunting and fishing within its reservation by anyone who is not a member of tribe. The tribal regulation applied to nonmembers of the tribe that included lands within the reservation owned in fee simple by non-Indians. Meanwhile, Montana continued to assert its authority to regulate hunting and fishing by non- Indians within the Crow reservation. The United States in its own right and as a fiduciary for the tribe filed an action seeking declaratory judgment quieting title to the bank of the Big Horn River and to establish that the tribe and the United States have sole authority to regulate hunting and fishing within the reservation. They sought to force Montana to obtain tribal permission before issuing hunting and fishing licenses for use on the reservation.

The *Montana* court addressed the sources and scope of the power of an Indian tribe to regulate hunting and fishing by non-Indians within its reservation owned in fee simple by non-Indians. In doing so, the Montana court analyzed the scope of a tribe's power to exert civil jurisdiction over non-Indians within their reservation boundaries by stating unequivocally that "to be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." *Id.* at 209.

The *Montana* court then announced that tribes may regulate the activities of non-members via taxation, licensing,

or other means. A tribe may also exercise civil jurisdiction over non-members who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee land within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or health or welfare of the tribe *Id.* at 209.

NAVAJO TRIBAL AUTHORITY

The Navajo Nation is a sovereign and self-governing society that predates the coming of the Europeans and the United States Constitution. The United States government recognized the Navajo Nation's sovereign status when it entered into two treaties with the Navajo Nation in 1850 (9 Stat. 974) and 1868 (15 Stat. 667). Treaty making between Indian tribes and Europeans and latter the United States government represented an agreement between two sovereign independent nations. *F. Cohen, Handbook Of Federal Indian Law 232 (1982)*. The Court of Appeals of the Navajo Nation (now the Supreme Court) pronounced this principle as follows: "When sovereign Indian nations dealt with the United States by treaty, they did so in an international law sense. Further, they (tribes) did not receive their lands and powers from the United States but only ceded lands and privileges to it." *Benally v. John*, 4 Nav.R. 39, 4 N.L.R 22 (Nav.Ct.App. 1983).

Although the Navajo Nation exercised self-government long before the arrival of Europeans, a Tribal Council was not formally established until 1926. The Navajo Tribal Council established the Navajo tribal courts and granted them authority

to exercise civil jurisdiction over all actions that occur within its territorial jurisdiction. This authority to exercise jurisdiction is coextensive with that of the Navajo Nation as a sovereign. *Deal v. Blatchford*, 3 Nav.R. 159, 3 N.L.R 91 (Nav.Ct.App. 1982).

The Navajo Nation's declaration of civil jurisdiction is found at Title 7 of the Navajo Tribal Code, section 253 (2)(1985) which provides: The District Courts of the Navajo Nation shall have original jurisdiction over....all civil actions in which the Defendant is a resident of Navajo Indian Country or has caused an action to occur within the territorial jurisdiction of the Navajo Nation. Territorial jurisdiction of the Navajo Nation shall extend to Navajo Indian Country, which is defined as all land within the exterior boundaries of the Navajo Indian Reservation or of the Eastern Navajo Agency, all land within the limits of dependent Navajo Indian communities, all Navajo Indian allotments, and all other land held in trust for, owned in fee by, or leased by the United States to the Navajo Tribe or any band of Navajo Indians. 7 N.T.C., Sec. 254.

Thus, the Navajo Tribal Code grants tribal courts jurisdiction over civil cases involving non-Indians if the action in which the defendant has caused an action to occur within the territorial jurisdiction of the Navajo Nation. It is undisputed that Defendants obtained a license to operate a uranium mill in Shiprock, New Mexico from 1952 through 1973. It is also an undisputed fact that Shiprock is located within the territorial jurisdiction of the Navajo Nation. Plaintiffs alleged that Defendant's uranium mill operation resulted in sickness and death; therefore, the authority to exercise jurisdiction by this Court is satisfied in accordance with 7 N.T.C. Sections 253, 254.

Moreover, the Navajo Nation "has the power to exercise civil authority over the conduct of non-Navajos where the conduct threatens or has some direct effect on the political integrity of the Navajo Nation." *U.S. v. Montana Supra*. The conduct Defendants allegedly committed has a direct effect on the political integrity of the Navajo Nation. Political integrity is dependant on the respect, honesty and faith the Navajo people entrust in the Navajo government to protect their rights in accordance with Navajo common law. A basic Navajo common law is that one who is found responsible for inflicting harm on another person must pay the victim for the harm to restore harmony. If the Navajo tribal courts cannot provide a forum to address allegations of tortuous conduct and provide remedies where appropriate, the political integrity of the tribal government is seriously compromised.

Furthermore, tribal Courts have civil jurisdiction over non-Indians who enter consensual relationships with the tribe or its members if the cause of action arises on the reservation. *U.S. v. Montana*, Supra. Defendants admitted that they entered into a lease with the Navajo Nation to operate the uranium mill. Defendants freely decided to enter a consensual agreement with the Navajo Nation to operate the mill in Shiprock. Any business deals, contracts, or leases made with the Navajo Nation that are designed to operate on the Navajo Nation subject those businesses to Navajo tribal jurisdiction. *Arizona Public Services v. Office of Navajo Labor Relations*, Slip Op. A-CV-08-87 (Navajo Supreme Ct. 1990).

In conclusion, Navajo Nation tribal courts have the authority and power to exercise jurisdiction over non-Indians where a claimant alleges that a non-Indian committed a tortuous act within the exterior boundaries of the Navajo Nation.

Any other conclusion would diminish the Navajo tribal court's ability to play an important and essential role in tribal self-government, contrary to Congressional policy of supporting Indian self-government and self determination by recognizing that tribal courts constitute and [sic] integral part of tribal sovereignty. In *National Farmers Union Insurance Co. v. Crow Tribe of Indians,* 471 U.S. 845, 105 S.Ct. 2447 , 85 L.Ed. 2d 818 (1985), the Supreme Court articulated the policy of encouraging development of tribal courts by making them the primary focus for adjudication where tribal jurisdiction is being challenged so that they have the first opportunity to evaluate the factual and legal basis for the challenge. *Id.* at 856-857. The Supreme Court in *Iowa Insurance Co. v. La Plante*, 480 U.S. 9, 107 S. Ct 971, 94 L.Ed.2d 10 (1987), reaffirmed that Indian tribal courts have a role in tribal sovereignty and self government. And unlike criminal jurisdiction, tribal civil jurisdiction over activities of non-Indians on reservation trust land presumptively lies in tribal Court unless affirmatively limited by specific treaty provisions or federal statute.

APPLICABILITY OF GENERAL JURISDICTIONAL STATUTES

To determine whether Plaintiff's claims are preempted by a comprehensive federal law, the Price Anderson Act, so as to preclude this Court from exercising jurisdiction, the Court needs to examine "...legislative history of the federal statute at issue and language expressed on the face of the statute to determine whether congress has divested tribal courts of jurisdiction." *Pela v. Peabody Coal Company,* Slip Op. A-CV-78-89 (Navajo Nation Supreme Ct. 1990). It is essential for this Court to examine the Price Anderson Act to discern

how it affects the sovereignty of the Navajo Nation with the preservation of tradition and culture in mind.

Federal General Jurisdictional statutes do not apply to tribes absent specific language which include the tribes. In *Becenti v. Vigil,* 902 F.2d 777 (10th Cir. 1990), petitioner, at the outset, filed a petition against employees of the Bureau of Indian Affairs. Defendants were successful in removing the case to the federal district court who in turn, dismissed the complaint for lack of jurisdiction. Plaintiff appealed to the 10th Circuit Court of Appeals which held that removal was not authorized by 28 U.S.C. Sec. 1442 (a)(1), the statute providing for removal from "state court" of actions against officers of the United States or agency thereof. The Court in *Becenti* stated "[this section] speaks only of removal of actions brought in "state" courts and cited several cases that have interpreted the "state courts" language in both section 1441 and 1443 (1) as not accompanying actions commenced in courts other than those of the fifty states." The 10th Circuit was very careful and did not want to expand the jurisdiction of federal courts beyond congressional mandate." *Id.* at 780.

In *Pela*, Supra, the Court addressed the issue of whether Congress, by granting concurrent state and federal jurisdiction over certain ERISA claims divested tribal courts of jurisdiction to hear those claims. Pela had filed a petition in tribal court alleging four causes of action. One claim was that defendant violated 29 U.S.C. Sections 1132(a)(1)(B) & 1140. Defendant filed a petition to remove the case to federal court on the grounds of federal question jurisdiction which was granted by the tribal court. Pela appealed to the Navajo Supreme Court. The Navajo Supreme Court held that 29 U.S.C. Sec. 1132(a)(1)(B), which did not mention Indian tribes, does not bar Indian tribal courts from hearing such

claims. The Court reasoned that since Pela filed his suit pursuant to Sec. 1132(a)(1)(B) which provided for concurrent jurisdiction, petitioner was permitted to sue in a non federal court that may, in turn, apply local law. In contrast, Congress desired uniformity in enforcement and regulation when it provided for exclusive jurisdiction regarding 29 U.S.C. Sec. 1132(e)(1) claims; consequently, the state and tribal courts have no jurisdiction where a federal statute provides for exclusive jurisdiction.

The Price Anderson Act, similar to ERISA does not mention Indian tribes. This Court is not willing to construe "state courts" contained in the Price Anderson Act to include Indian tribes. Thus, the Court will examine the Price-Anderson Act to determine whether it provides for state and federal concurrent jurisdiction. If it is found that it provides for exclusive jurisdiction then tribal courts may be are [sic] barred from exercising jurisdiction over this claim. On the other hand, if it is found that there is concurrent jurisdiction, then this Court will be persuaded that the Price Anderson Act does not bar this court from exercising jurisdiction over this claim.

THE PRICE ANDERSON ACT 42 U.S.C. SECTION 2011 *et seq*.

Defendants argue that Plaintiff's claims are subject to the Price-Anderson Act because said action seeks to hold defendants liable for injuries allegedly caused from exposure to vanadium, uranium and various radioactive substances and heavy metals resulting from the Shiprock Mill operations. Defendants assert that this is a "public liability action" pursuant to the Price Anderson Act. 42 U.S.C. Sec. 2210 (n)(2) which provides an exclusive remedy for such actions

with an automatic right of removal if the claim was filed in state court.[1/]

Defendants cited *In re TMI Litigation Cases Consolidated II*, 940 F. 2d 832 (3rd Cir. 1991) to support its claim that 42 U.S.C. Sec. 2210(n)(2) is the exclusive remedy for "public liability" actions and that Congress created a federal cause of action for such claims when it amended the Act in 1988. According to the 3rd Circuit Court, under the terms of the 1988 Amendments Act, "public liability action" encompasses "any legal liability of any person who may be liable on account of a nuclear incident." *Id.* at 855 The court further observed that given the breadth of this definition, if a plaintiff fails to state a public liability claim potentially compensable under the Price-Anderson Act then plaintiff has no such claim at all. The *TMI* Court concluded that a claim growing out of any nuclear incident is compensable under the terms of the Amendment or it is not compensable at all and no state cause of action based on public liability exists after the 1988 amendments.

[1/] Public liability is defined as "any legal liability arising out of or resulting from a nuclear incident... Sec. 2014(w). Nuclear incident is defined as "any occurrence, including an extraordinary nuclear occurrence, within the U.S. causing...bodily injury, sickness, decease [sic], death, or loss of or damage to property, or loss of use of property, arising our [sic] of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material... Sec. 2014(q). Byproduct material includes "tailings or waste produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content.

DEVELOPMENT OF ATOMIC ENERGY

In 1946 Congress enacted the Atomic Energy Act of 1946, 60 Stat. 755, whereby the federal government monopolized the use, control and ownership of nuclear technology. The Atomic Energy Commission (hereinafter AEC) was given exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession and use of nuclear material. In 1954, the Atomic Energy Act was amended, 68 Stat 919, to encourage private construction, ownership and operation of nuclear power plants for peaceful purposes while exclusive jurisdiction to regulate and license nuclear safety was reserved to the AEC.

In 1957 Congress passed the Price-Anderson Act as an amendment to the Atomic Energy Act. Pub. L. 85-256, 71 Stat. 576, to assure adequate public compensation in case of a nuclear accident, and to limit the liability of private industry in order to encourage private participation in the development of nuclear energy. An indemnification scheme was established under which operators of licensed nuclear facilities could obtain up to $60 million in private financial protection against suits. The government would then provide indemnification for the next $500 million of liability, and the resulting $560 million would be the limit of liability for any one nuclear incident. The Act was amended again 1959, "to clarify the responsibilities" of the states and the AEC with respect to the regulation of by-product, source, and special nuclear material. 42 U.S.C., Sec. 2021 (a)(1). States were now allowed to regulate certain nuclear material in quantities not sufficient to form a critical mass. The AEC retained the exclusive jurisdiction over disposal of certain by-products, source, or special nuclear materials.

The 1966 Amendments to the Price-Anderson Act authorized the AEC to require defendants covered by the financial protection and indemnity to waive certain state-law defenses otherwise available. Said amendments responded to concerns raised regarding the adequacies of state law remedies in administering compensation for a victim of a major nuclear incident. Congress required such waivers out of concern that state-laws, such as the negligence standard of liability, were ill-suited to the problems of nuclear hazards. In 1974 the AEC was abolished and the regulatory duties of the AEC were assigned to the Nuclear Regulatory Commission (NRC). In 1988 42 U.S.C. Sec. 2210 (n)(2) was amended to provide that the federal courts shall have original jurisdiction over public liability claims.

Defendants contend the Atomic Energy Act and the Price-Anderson Act provide a comprehensive federal regulatory program for the licensing and operation of nuclear related facilities and claims arising from their activities.

FEDERAL PREEMPTION

The Court must now determine whether or not the federal government's regulation of industries associated with the use, production and control of nuclear energy are so pervasive as to preclude this Court from exercising jurisdiction. Federal preemption occurs in a few specific ways. First, Congress has the authority to preempt within congressional limits the authority of states by express terms. Secondly, where there is no explicit preemptive language, the intention of Congress may be found where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the state to supplement it. Thirdly, preemption is found where state laws conflict with federal

laws or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. *Pacific Gas & Electric Company v. State Energy Resources Conservation & Development*, 461 US 190, 175 L.Ed2d 752, 103 S.Ct. 1713 (1983).

As discussed above, a challenge to tribal court jurisdiction based on a federal statute that does not include Indian tribes requires another step in the analysis. The *Pela* court held that where a federal statute does not include Indian tribes but confers concurrent jurisdiction upon the federal and state courts, the tribal courts may exercise jurisdiction over the claim. Since this Court has already found that the Price-Anderson Act does not specifically include Indian tribes and will not expand the language of "states" as used in the Price-Anderson Act, an analysis on whether the Act provides for federal and state concurrent jurisdiction is necessary. The third method of finding preemption will be discussed following the discussion of concurrent jurisdiction.

CONCURRENT JURISDICTION

The Price-Anderson Act is not about exclusivity, rather it confers concurrent jurisdiction to both the states and federal courts where indeed there is a public liability action. The Court *In Re TMI Consol. II*, Supra, acknowledged that the retroactivity features of the Amendment Act promote "equitable and uniform treatment of victims,"; "the orderly distribution of funds"; and, "avoidance of similar issues in multiple jurisdictions that may occur in the absence of consideration". The features reveal Congressional concern with multiple claims and the cost of dealing with the duplicative issues in several state courts. The foregoing features would not be factors where only one person is

affected by the nuclear incident or where all claims are filed in a single state court. Thus, it is possible and sometimes more efficient for a state to resolve a public liability action. *Id.* at 861

An example of how and when resolution of a public liability claim in a state court is more efficient than removing the claim to federal court occurred in *Akins v. Rodriguez*, 15 F 3d 883 (9th Cir. 1994). Plaintiff filed a claim in California state court against American Nuclear Insurers (ANI) and, current and former employees of nuclear power plant's owner and operator. Said claim was based upon contamination of stream by discharge of radioactive material. ANI provided insurance to nuclear power plants licensed by the Nuclear Regulatory Commission as required by the Price Anderson Act. ANI removed the case to federal court. The federal district court issued a stay and remanded the case back to state court. ANI petitioned the 9th Circuit Court of Appeals for a writ of mandamus challenging the remand order.

The 9th Circuit Court first considered whether abstention was proper under *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). This case set out factors which should be considered by a federal district court in determining whether to defer to a concurrent state proceeding. The 9th Circuit court held that the district court did not abuse it [sic] discretion in ordering the remand because the decision was based on the concern the dangers of piecemeal litigation since litigation of *Akins I* was pending in state court to determine the issue of whether certain injuries from radiation were sufficient to support a cause of action under California tort law. Moreover, *Akin I* had been pending in state court for four years and there had been little progress in the federal

litigation and the forum in Sacramento was equally convenient. Importantly, the court found that state law questions predominate in the federal action and, state substantive law is applied in public liability actions, unless such law is inconsistent with the Price-Anderson Act. *Id.* at 887.

Nor does the Price-Anderson Act preclude the use of state remedies. In *Silkwood v. Kerr-Mcgee Corporation*, 464 U.S., 78 LE2d 443, 104 S.Ct. 615 (1984), the Supreme Court held that state-authorized award of punitive damages arising out of escape of plutonium from nuclear facility was not preempted by federal law. The Court looked at the legislative history noting that the 1966 amendments made it clear that state remedies were still available, notwithstanding AEC's regulating and licensing authority. A Joint Committee Report regarding the relationship between the Act and existing state tort law was cited as follows: "Since the rights of third parties who are injured are established by state law, there is no interference with the state law until there is likelihood that the damages exceed the amount of financial responsibility required together with the amount of the indemnity. At that point the federal interference is limited to the prohibition of making payments through the state courts and to pro rating the proceeds available *S. Rep No* 296, 85th Cong, 1st Sess. 9 (1957), U.S.C. Cong and Admin News 1957, pp 1803, 1810. *Id.* at 456.

In determining that punitive damages have always been part of traditional tort law that have not been specifically supplanted by the Act, the Court stated, "It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal means." *Id.* at 454. In conclusion, the Price Anderson Act has not

totally exempted states from hearing public liability claims; thus, there is no absolute exclusive federal court jurisdiction under the PAA.

The Navajo tribal court, similarly, are not precluded from hearing torts allegedly arising from a defendant's conduct within the territorial jurisdiction of the Navajo Nation.

STATE/TRIBAL LAW DOES NOT CONFLICT WITH FEDERAL LAW

The third way preemption may occur are where state laws conflict with federal laws or where state law stands as an obstacle to the accomplishment of Congressional objectives. In *Pacific Gas & Electric Co Supra*, the Supreme Court held that a California statute imposing a moratorium on the certification of new nuclear plants until the state energy commission finds that there exists a demonstrated technology or means for the disposal of high level nuclear was not preempted by the Atomic Energy Act. Petitioner argued that the federal government was the sole regulator of all matters matters [sic] and the statute was preempted because it attempted to regulate the nuclear industry. The Court accepted the state's avowed economic rather than safety purpose as the rationale for enacting the statute and held that the statute lied outside the federally occupied field of nuclear safety regulation. The Court reasoned that the Atomic Energy Act, along with all of its revisions, Congress has preserved the dual regulation of nuclear-powered electricity generation: the Federal Government maintains complete control of the safety and "nuclear" aspects of energy generation. Whereas the States exercise their traditional authority over economic

questions such as the need for additional generating capacity, the type of generating facilities to be licensed, land use, and rate making.

In the case at bar, the Petitioners, likewise are not attempting to regulate the nuclear industry which is preempted by the Price Anderson Act. Petitioner seek to redress harm they allegedly suffered as a result of the Shiprock Mill operations. Moreover, an assumption of jurisdiction by the Navajo Tribal Court to adjudicate a common law tort that does not conflict the federal government's goal of regulating nuclear safety concerns.

FEDERAL REGULATORY SCHEME

Defendant contends in enacting the Atomic Energy Act and the Price Anderson Act, Congress declared that the possession, use and production of atomic energy and nuclear materials were vital to the United States and must be subject to federal control and regulation. Also, in its efforts to encourage private entities to participate in the development of the United States' nuclear resources, the federal government created a comprehensive system for resolving nuclear tort claims.

This Court does not disagree with these statements, the legislative history of the Acts indeed set forth the intent of Congress. However, Defendants arguments are misdirected. Petitioner's claim does not attempt to regulate the nuclear industry. In fact, to do so would be a physical impossibility because the Shiprock Mill has not been operating for over 20 years. Instead, plaintiffs are asking this Court to adjudicate a Traditional common law tort that has not been precluded by the Price Anderson Act. As discussed previously, the Price

Anderson Act did not preclude the use of state remedies nor did it preclude the use of Navajo Nation remedies.

Moreover, Defendant's argument that this Court's jurisdiction is foreclosed by the Treaty of 1850 borders on an outdated and patronizing attitude toward Indian tribes. Defendants argue that since the Navajo Nation depends on the United States for its protection and defense it must defer to a comprehensive federal scheme created for the resolution of nuclear torts. Apparently, Defendant's rationale is that the Atomic Energy Act and the Price Anderson Act were designed to protect the common defense and security of all United States citizens and exercise of tribal jurisdiction is a violation of the 1850 Treaty since the Navajo Nation agreed that the responsibility of its defense against its aggressors would rest in the United States. This Court is confused. Are Defendants asserting that exercise of jurisdiction over an alleged tort resulting form [sic] a Uranium Mill within the territorial jurisdiction of the Navajo Nation is an act of war?

Further, Defendant's argument implies that since the Navajo Nation entered into a treaty with the United States for protection from foreign aggressors, the Navajo people must sacrifice their lives for the development of nuclear energy. Indeed, Congress declared that the development of nuclear energy as paramount concern in enacting the Acts, but it was not to be developed at all costs, certainly not at all human costs. Defendants also argue that nuclear torts are new and has [sic] no part in Navajo traditions. Harm resulting from new technology does not automatically foreclose a court from providing a forum for Navajos who may have been harmed by new technology. The Navajo Nation is constantly bombarded by new technology and the Navajo courts have been able to deal with them as they arise. The fact that nuclear technology

is not a Navajo tradition does not preclude the Navajo courts from administering justice. In sum, the Atomic Energy Act and the Price Anderson Act do not preempt this Court from adjudicating torts arising within the territorial jurisdiction of the Navajo Nation.

NON- PUBLIC LIABILITY ACTION

Even if defendant's argument that the Price Anderson Act applied was accepted, this Court would not be precluded from hearing this claim because the factual prerequisite of "public liability" action has not been shown to the court. The factual prerequisite of the statute requires first that "public liability" be found before it is covered by the Price-Anderson Amendments umbrella. For a private company to be eligible for a public liability claim, the company must have an agreement with the federal government to handle nuclear material. 42 U.S.C Sec. 2021(C)4 The agreement includes licensing; guarantee of insurance; and, indemnification by the federal government. Those companies that did not obtain a license or those that did not obtain federal indemnification do not fall with [sic] the "public liability" scope and the Act is not applicable. The NRC was given discretion on whether to require licensed plants to maintain financial protection. Hence, government indemnification is available only to those who are indemnified. Section 2210(e).

Accordingly, at the outset a federal definitional matter must be resolved where an action asserts liability arising out of a nuclear incident. To wit: is this a public liability action? If the answer is yes, the Price Anderson Act is applicable and no action for injuries caused by the release of radiation from a federally licensed nuclear power plant separate from the

federal public liability action created by the 1988 amendments is allowed.

It is this Court's opinion that Defendants failed to show that the Plaintiffs have a public liability claim subject to removal that is potentially compensable under Price Anderson Amendment Act. Defendants have not shown the Court that they were licensed with the federal government nor have they shown that they were covered by federal indemnity insurance. Moreover, public liability claims that are compensable pursuant to the Price-Anderson Act involves the federal government as a named defendant so that the federal government may indemnify the plaintiffs and channel liability in accordance with the scheme. Thus far in this case, neither the NRC or the Secretary of Energy have been named or brought in as defendants. This Court concludes that this claim does not fall with the scope of a public liability action and the Price Anderson Act is not applicable here. Since the Price-Anderson Act gives federal courts original jurisdiction over public liability actions, state courts and tribal courts are not precluded from hearing "non-public liability" claims.

COMITY

In *Pela*, the Navajo Supreme held that the doctrine of comity applies only in actions properly pending in "the courts of another sovereign." Comity is sparingly applied out of respect and deference to tribal sovereignty. For the reasons stated above, this Court is not convinced that the Price Anderson Act bars the Navajo tribal court from hearing this action case. Tribal Court jurisdiction is an important and integral part of the tribe's sovereign status. Further, to allow the federal courts to determine substantive Navajo common law would seriously undermine Navajo tribal sovereignty. In

conclusion, to extend courtesy based on comity in this case would not be in the best interest of the Navajo tribe.

CONCLUSION

Congress enacted the Price Anderson Amendment Act, to create a body of federal substantive law regulating nuclear activities to ensure uniformity in enforcement of nuclear safety and to provide compensation over public liability claims. Exercise of tribal court jurisdiction does not conflict with nor interfere with that Congressional intent. As in *Pela*, those areas of state and federal public liability claims are exclusive to the federal courts. Thus, Navajo tribal jurisdiction is not precluded by the Price Anderson Act.

IT IS HEREBY ORDERED that the Defendants' Motion to Dismiss this case is hereby DENIED.

SO ORDERED this 6th day of June, 1996.

s/Lorene Ferguson
Judge Lorene Ferguson,
Shiprock Judicial District Court

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 95-2121, 96-2127

KERR-McGEE CORPORATION,

Plaintiff-Appellant,

and

CYPRUS FOOTE MINERALS CORPORATION; RIO ALGOM, LTD.; UMETCO MINERALS CORPORATION; UNION CARBIDE CORPORATION,

Plaintiffs,

v.

KEE TOM FARLEY, individually and on behalf of the Estate of Lucy K. Farley; CARMELITA FARLEY JOE; HAROLD KADY, SR., individually and on behalf of the Estate of Julia Mae Kady,

Defendants-Appellees.

ORDER

Filed July 24, 1997

Before, SEYMOUR, Chief Judge, LOGAN, and LUCERO, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

PATRICK FISHER, Clerk

By: /s Nicole Kier
Deputy Clerk

APPENDIX E

The Atomic Energy Act, as amended by the Price-Anderson Act and the Price-Anderson Amendments Act, 42 U.S.C., provides:

§ 2012. Congressional findings

The Congress of the United States makes the following findings concerning the development, use, and control of atomic energy:

(a) The development, utilization, and control of atomic energy for military and for all other purposes are vital to the common defense and security.

(b) Repealed. Pub. L. 88-489, § 1, Aug. 26, 1964, 78 Stat. 602

(c) The processing and utilization of source, byproduct, and special nuclear material affect interstate and foreign commerce and must be regulated in the national interest.

(d) The processing and utilization of source, byproduct, and special nuclear material must be regulated in the national interest and in order to provide for the common defense and security and to protect the health and safety of the public.

(e) Source and special nuclear material, production facilities, and utilization facilities are affected with the public interest, and regulation by the United States of the production

and utilization of atomic energy and of the facilities used in connection therewith is necessary in the national interest to assure the common defense and security and to protect the health and safety of the public.

(f) The necessity for protection against possible interstate damage occurring from the operation of facilities for the production or utilization of source or special nuclear material places the operation of those facilities in interstate commerce for the purposes of this chapter.

(g) Funds of the United States may be provided for the development and use of atomic energy under conditions which will provide for the common defense and security and promote the general welfare.

(h) Repealed. Pub. L. 88-489, § 2, Aug. 26, 1964, 78 Stat. 602

(i) In order to protect the public and to encourage the development of the atomic energy industry, in the interest of the general welfare and of the common defense and security, the United States may make funds available for a portion of the damages suffered by the public from nuclear incidents, and may limit the liability of those persons liable for such losses.

§ 2013. Purpose of chapter

It is the purpose of this chapter to effectuate the policies set forth above by providing for —

(a) a program of conducting, assisting, and fostering research and development in order to encourage maximum scientific and industrial progress;

(b) a program for the dissemination of unclassified scientific and technical information and for the control, dissemination, and declassification of Restricted Data, subject to appropriate safeguards, so as to encourage scientific and industrial progress;

(c) a program for Government control of the possession, use, and production of atomic energy and special nuclear material, whether owned by the Government or others, so directed as to make the maximum contribution to the common defense and security and the national welfare, and to provide continued assurance of the Government's ability to enter into and enforce agreements with nations or groups of nations for the control of special nuclear materials and atomic weapons.

(d) a program to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public;

(e) a program of international cooperation to promote the common defense and security and to make available to cooperating nations the benefits of peaceful applications of atomic energy as widely as expanding technology and considerations of the common defense and security will permit; and

(f) a program of administration which will be consistent with the foregoing policies and programs, with international arrangements, and with agreements for cooperation, which will enable the Congress to be currently informed so as to take further legislative action as may be appropriate.

§ 2014. Definitions

The intent of Congress in the definitions as given in this section should be construed from the words or phrases used in the definitions. As used in this chapter:

(q) The term "nuclear incident" means any occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material: *Provided, however,* That as the term is used in section 2210(l) of this title, it shall include any such occurrence outside the United States: *And provided further*, That as the term is used in section 2210(d) of this title, it shall include any such occurrence outside the United States if such occurrence involves source, special nuclear, or byproduct material owned by, and used by or under contract with, the United States: *And provided further*, That as the term is used in section 2210(c) of this title, it shall include any such occurrence outside both the United States and any other nation if such occurrence arises out of or results from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material licensed pursuant to subchapters V, VI, VII, and IX of this division,

which is used in connection with the operation of a licensed stationary production or utilization facility or which moves outside the territorial limits of the United States in transit from one person licensed by the Nuclear Regulatory Commission to another person licensed by the Nuclear Regulatory Commission.

(w) The term "public liability" means any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation (including all reasonable additional costs incurred by a State, or a political subdivision of a State, in the course of responding to a nuclear incident or a precautionary evacuation), except: (i) claims under State or Federal workmen's compensation acts of employees of persons indemnified who are employed at the site of and in connection with the activity where the nuclear incident occurs; (ii) claims arising out of an act of war; and (iii) whenever used in subsections (a), (c), and (k) of section 2210 of this title, claims for loss of, or damage to, or loss of use of property which is located at the site of and used in connection with the licensed activity, where the nuclear incident occurs. "Public liability" also includes damage to property of persons indemnified: *Provided*, That such property is covered under the terms of the financial protection required, except property which is located at the site of and used in connection with the activity where the nuclear incident occurs.

(hh) The term "public liability action", as used in section 2210 of this title, means any suit asserting public liability. A public liability action shall be deemed to be an action arising under section 2210 of this title, and the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident

involved occurs, unless such law is inconsistent with the provisions of such section.

§ 2210. Indemnification and limitation of liability

(h) Conditions of agreements of indemnification

The agreement of indemnification may contain such terms as the [Nuclear Regulatory] Commission or the Secretary [of Energy], as appropriate, deems appropriate to carry out the purposes of this section. Such agreement shall provide that, when the Commission or the Secretary, as appropriate, makes a determination that the United States will probably be required to make indemnity payments under this section, the Commission or the Secretary, as appropriate, shall collaborate with any person indemnified and may approve the payment of any claim under the agreement of indemnification, appear through the Attorney General on behalf of the person indemnified, take charge of such action, and settle or defend any such action. The Commission or the Secretary, as appropriate, shall have final authority on behalf of the United States to settle or approve the settlement of any such claim on a fair and reasonable basis with due regard for the purposes of this chapter. Such settlement shall not include expenses in connection with the claim incurred by the person indemnified.

(n) Waiver of defenses and judicial procedures

(2) With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the nuclear incident takes place, or in the case of a nuclear incident taking place outside the United States, the United States District Court for the District of Columbia, shall have original jurisdiction

without regard to the citizenship of any party or the amount in controversy. Upon motion of the defendant or of the Commission, or the Secretary, as appropriate, any such action pending in any State court (including any such action pending on August 20, 1988) or United States district court shall be removed or transferred to the United States district court having venue under this subsection. Process of such district court shall be effective throughout the United States. In any action that is or becomes removable pursuant to this paragraph, a petition for removal shall be filed within the period provided in section 1446 of Title 28, or within the 30-day period beginning on August 20, 1988, whichever occurs later.

(3)(A) Following any nuclear incident, the chief judge of the United States district court having jurisdiction under paragraph (2) with respect to public liability actions (or the judicial council of the judicial circuit in which the nuclear incident occurs) may appoint a special caseload management panel (in this paragraph referred to as the "management panel") to coordinate and assign (but not necessarily hear themselves) cases arising out of the nuclear incident, if --

(i) a court, acting pursuant to subsection (o) of this section, determines that the aggregate amount of public liability is likely to exceed the amount of primary financial protection available under subsection (b) of this section (or an equivalent amount in the case of a contractor indemnified under subsection (d) of this section); or

(ii) the chief judge of the United States district court (or the judicial council of the judicial circuit)

determines that cases arising out of the nuclear incident will have an unusual impact on the work of the court.

(B)(i) Each management panel shall consist only of members who are United States district judges or circuit judges.

(ii) Members of a management panel may indicate any United States district judge or circuit judge of another district court or court of appeals, if the chief judge of such other district court or court of appeals consents to such assignment.

(C) It shall be the function of each management panel --

(i) to consolidate related or similar claims for hearing or trial;

(ii) to establish priorities for the handling of different classes of cases;

(iii) to assign cases to a particular judge or special master;

(iv) to appoint special masters to hear particular types of cases, or particular elements or procedural steps of cases;

(v) to promulgate special rules of court, not inconsistent with the Federal Rules of Civil Procedure, to expedite cases or allow more equitable consideration of claims;

(vi) to implement such other measures, consistent with existing law and the Federal Rules of Civil Procedure, as will encourage the equitable, prompt, and efficient resolution of cases arising out of the nuclear incident; and

(vii) to assemble and submit to the President such data, available to the court, as may be useful in estimating the aggregate damages from the nuclear incident.

(s) Limitation on punitive damages

No court may award punitive damages in any action with respect to a nuclear incident or precautionary evacuation against a person on behalf of whom the United States is obligated to make payments under an agreement of indemnification covering such incident or evacuation.

Supreme Court, U.S.
FILED
DEC 22 1997
CLERK

(2)

No. 97-705

In The

Supreme Court of the United States

October Term, 1997

KERR-McGEE CORPORATION and CYPRUS FOOTE MINERAL COMPANY,

Petitioners,

vs.

KEE TOM FARLEY, Individually and on behalf of the Estate of LUCY K. FARLEY, CARMELITA FARLEY JOE and HAROLD KADY, SR., Individually and on behalf of the Estate of JULIA MAE KADY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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QUESTION PRESENTED

Can an Indian tribal court be divested of adjudicatory authority to hear a case involving alleged tortious action which occurred on the tribe's territory and which harmed members of the tribe where there is no statute or regulation divesting the tribe of such authority or prohibiting it from hearing such a dispute?

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STATEMENT OF THE CASE

Petitioners are two mining and engineering companies that between 1952 and 1973 ran a vanadium and uranium mill on the Navajo Nation's reservation in Shiprock, New Mexico. The mill was run pursuant to contracts and licenses which petitioners had entered into with the Navajo Nation and the Atomic Energy Commission. The land on which the mill was situated was owned by the Navajo Nation and licensed to petitioners.

The underlying lawsuit in this litigation was commenced on January 12, 1995 in the Shiprock District Court of the Navajo Nation. The suit was brought by three individual Navajos and arises out of the cancer-caused deaths of two of their family members. The complaint alleges that these cancers were the result of radioactive, toxic and chemical emissions negligently released by petitioners into areas adjacent to the Shiprock Mill where plaintiffs and their now-deceased family members lived.

The Navajo Nation has a complete court system analogous to state court systems, including trial courts and a Supreme Court. The Navajo Nation has due process guarantees and a code of civil procedure modeled on the Federal Rules of Civil Procedure. Navajo court decisions are reported in the Navajo Law Reporter.

On April 21, 1995, petitioners sued in the United States District Court for the District of New Mexico seeking to enjoin the Navajo court plaintiffs from proceeding with their underlying lawsuit on the ground that the Navajo tribal courts lacked jurisdiction to hear claims against these petitioners. Petitioners asserted that the Price-Anderson Act, 42 U.S.C. § 2011, *et seq.*, created both a purportedly exclusive federal cause of action and a federal forum to resolve any cases "arising out of or resulting from a nuclear incident." (*See* Petitioners' Appendix, hereinafter "PA", 39a).

The District Court held, *inter alia*, that the Price-Anderson Act neither created exclusive federal court jurisdiction, nor divested Indian tribal courts from hearing disputes like the present and, that, under the tribal exhaustion doctrine established by this Court, the present case should proceed in Navajo Tribal Court. (PA 28a-34a). The District Court's opinion is reported at 915 F. Supp. 273.

Petitioners appealed to the Tenth Circuit which, on June 25, 1997, denied their appeal, affirming the District Court's holdings and decision in an opinion reported at 115 F.3d 1498. (PA 4a-22a). On July 24, 1997, the Court of Appeals denied both petitioners' petition for rehearing and their suggestion for rehearing en banc. (PA 62a).

REASONS FOR DENYING THE WRIT

Petitioners present no grounds that would warrant this Court's review.

First, the decision of the Court of Appeals does not conflict with that of any other circuit.

Second, the Court of Appeals' decision was merely one of abstention pending re-review — a decision holding that the issue of federal regulatory or adjudicatory exclusivity should first be heard by the Navajo courts prior to a possible reconsideration by the federal courts. Contrary to petitioners' intimations, the present issues will not escape federal court review. Petitioners will have the ability to challenge the Navajo courts' decision on jurisdiction should the case proceed to judgment and appeal.

Third, petitioners' claims are misplaced. What they propose is that federal courts possess exclusive jurisdiction over tort actions involving radiation health and safety. Petitioners are wrong.

The federal government *does not* "exercise exclusive authority to regulate nuclear safety" (Pet. i) and petitioners can cite no statute or regulation to support their contention. To the contrary, the relevant provision of the applicable law, the Price-Anderson Act, expressly provides that cases involving injury from nuclear incidents are to be governed by substantive *state* law, 42 U.S.C. § 2014(hh), — a provision absolutely inconsistent with any proposition that the federal government's regulatory authority is exclusive.

Nor is there an "exclusive federal remedy for nuclear torts." (Pet. i). The Price-Anderson Act, by its very terms provides for concurrent federal and state court jurisdiction (with a right of removal from state to federal court). 42 U.S.C. § 2210(n)(2). Necessarily, petitioners' claim is that Congress must have *meant to* provide for an exclusive federal remedy for cases filed in Indian courts even though it did not do so explicitly. This would "turn[] the historic tribal sovereignty analysis on its head." (PA 28a). Well-established principles of federal law hold that Indian tribes cannot be divested of jurisdiction in the absence of an express and specific Congressional enactment. Nothing in the Price-Anderson Act divests Indian courts of jurisdiction to hear claims involving tortious injury arising out of the operation of a uranium mill.

The District Court and the Court of Appeals correctly and unanimously rejected petitioners' argument. The petition should be denied.

I.

THIS CASE PRESENTS NO ISSUE THAT WILL ESCAPE FEDERAL COURT REVIEW.

Petitioners intimate that unless this Court now considers the Court of Appeals' decision, there will be no review of the jurisdictional issues presented. Petitioners are wrong.

First, the decisions below were the first to address the issue of the Price-Anderson Act's applicability to Indian tribes. No other Court of Appeals has addressed the issue and certainly the decision below has set up no conflict among Courts of Appeals.[1]

Second, notwithstanding what petitioners try to suggest to the Court, they will have full opportunity to challenge the issues presented in the courts below. Three results are possible in the underlying case: (a) petitioners could win in the tribal court; (b) the case could settle; or (c) the Navajo plaintiffs-respondents could succeed in the tribal court and then petitioners could challenge the jurisdictional issue in federal court. Indeed, while petitioners mix jurisdictional and choice-of-law issues repeatedly in their petition, the choice-of-law issues have not as yet been decided by the Navajo courts. In fact, petitioners are now requesting the tribal court to reconsider its ruling concerning jurisdiction and are presently raising before the tribal court the exact same choice-of-law questions they contend should compel this Court's review. (*See* Pet. 15-16). Furthermore, the decisions of the Navajo trial court on these matters will be subject to review by the Navajo Supreme Court. And, ultimately, the issue of jurisdiction could then, again, be raised by petitioners in the federal courts.

It is manifestly premature for petitioners to contend that this Court should review this case when the jurisdictional and choice-of-law contentions petitioners are now making are still

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1. The same issues here are presented in two cases now pending in one proceeding before the Ninth Circuit, *El Paso Gas Co. v. Neztsosie*, *appeal pending*, No. 96-17121 (9th Cir.); *Cyprus Foote Minerals Co. v. Richards*, *appeal pending*, No. 96-17139 (9th Cir.). There is no reason to believe that the Ninth Circuit will reverse the District of Arizona's decision which permitted the Navajo tribal cases to proceed in Navajo tribal court or that the Ninth Circuit will disagree with the Tenth Circuit's decision below in this case.

to be resolved by the tribal court. Under such circumstances where a full record has not even been developed, recourse to this Court is neither necessary nor efficient.

II.

THE COURTS BELOW CORRECTLY HELD THAT THE TRIBAL EXHAUSTION DOCTRINE REQUIRES THAT THIS CASE FIRST PROCEED IN TRIBAL COURT.

Petitioners do no better on the merits of their claim.

Initially, they attempt to disregard the "tribal exhaustion doctrine" established by *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985), and *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). This doctrine is based on Congress' policy of encouraging tribal self-government. *See National Farmers Union*, 471 U.S. at 856-857. Under this doctrine, when a lawsuit is brought over which an Indian tribal court may have jurisdiction, a defendant may not challenge in federal court the tribal court's exercise of jurisdiction without first exhausting all tribal court remedies so long as three exceptions are not applicable: the assertion of tribal jurisdiction is not motivated by a desire to harass or is conducted in bad faith; the action is not "patently violative" of an "express jurisdictional prohibition"; or "exhaustion would be futile because of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction." *National Farmers*, 471 U.S. at 856 & n.21; *Iowa Mutual Ins. Co.*, 480 U.S. at 19 & n.12; *see also Strate v. A-1 Contractors*, __ U.S. __, 117 S. Ct. 1404, 1411 & n.7 (1997). Ignoring the tribal exhaustion doctrine, petitioners brought this case in federal court to enjoin a tribal court lawsuit without exhausting tribal court remedies.

Petitioners do not meet any of the three exceptions to the tribal exhaustion doctrine. Their only argument is that the

underlying case's proceeding in Navajo tribal court was "patently violative" of an "express jurisdictional prohibition". However, as both the District Court and the Court of Appeals recognized, the Price-Anderson Act contains no prohibition on tribal court jurisdiction whatsoever, much less an "express" prohibition that would be "patently violat[ed]" by exercise of tribal court jurisdiction. (*See* PA 12a-13a, 28a-32a). In the words of the Court of Appeals: "[s]imply put, 'exclusive jurisdiction' is not conferred unless conferred explicitly." (PA 13a).[2]

Petitioners all but admit this in their petition when they write that the Act "clearly reflects an *intent* to make a federal forum available to resolve" nuclear tort claims. (Pet. at 7) (emphasis supplied).[3] An implicit intent to create a jurisdictional prohibition cannot, by definition, constitute an "express" one. There is not

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2. Respondents do not agree with the Court of Appeals' conclusion that the Price-Anderson Act applies to this case since they do not agree the Act's definition of a "nuclear incident" was intended to encompass any and all injuries related to uranium. However, that determination of the Court of Appeals is not being here challenged by respondents.

3. Petitioners' arguments as to why Congress "clearly" must have intended that tribal courts cannot hear the present case are: (1) that a tribal court might get the law wrong; (2) that consolidation of all actions arising out of nuclear torts could not be achieved; and (3) that a misapplication of the law might occur so that a defendant could be forced to defend against punitive damages. (Pet. 16-17). The first and third of these contentions are simply arguments that Indian courts cannot be trusted to apply the law correctly; yet "[t]he alleged incompetence of tribal courts is not among the exceptions to the exhaustion requirement." *See Iowa Mut. Ins.*, 480 U.S. at 19. As to petitioners' argument regarding consolidation, the District Court effectively addressed this point when raised below: "[i]t was by virtue of federal government contracts that nuclear mills were constructed and operated on the Navajo reservation. Congress is obviously aware of the possibility of nuclear torts occurring on tribal lands", yet it did not provide for consolidation of cases from tribal courts, as it did from state courts. (PA 37a).

a single decision by any court holding that there can be an "implicit" exception to the tribal exhaustion doctrine's "exclusive jurisdiction" rule. As the District Court wrote,

> [b]e it intentional or an oversight, until Congress addresses the issue, this Court will not interpret its silence as an "express jurisdictional prohibition." To do so would ignore important Congressional and judicial concerns regarding tribal sovereignty.

PA 37a.[4]

III.

THERE IS NO REGULATORY BAR TO THE NAVAJO COURT'S JURISDICTION OVER THE UNDERLYING ACTION.

Facing an inability to meet the three exceptions to the tribal exhaustion doctrine, petitioners claim the Navajo tribe lacks

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4. The courts, including this one, have repeatedly rejected the proposition that Indian courts can implicitly be stripped of jurisdiction. *See, e.g., Iowa Mut. Ins.*, 480 U.S. at 17-19 (interpreting 28 U.S.C. § 1332, the diversity jurisdiction statute); *United States v. Plainbull*, 957 F.2d 724, 726-727 (9th Cir. 1992) (where statute, 28 U.S.C. § 1355, provided for federal jurisdiction of cases "exclusive of the courts of the States", such a delegation of exclusive jurisdiction to federal courts did not apply to tribal courts because "a tribal court is not a state court" and tribal courts were therefore not divested of concurrent jurisdiction); *Becenti v. Vigil*, 902 F.2d 777, 780 (10th Cir. 1990) (where federal removal statute, 28 U.S.C. § 1441, provided for removal of cases from "state" courts but not from tribal courts, the court wrote, "The question before us, however, is not whether Congress has the power to authorize removal of actions commenced in tribal courts against federal officials, but rather whether Congress has in fact done so . . . With this in mind, we conclude that the statutory language referring to actions commenced in 'State court' does not extend to an action in the Jicarilla Apache Tribal Court.").

adjudicative authority over this case because it lacks regulatory authority over "nuclear safety." Petitioners are wrong for two reasons.

A. The Price-Anderson Act Does Not Create Exclusive Federal Court Jurisdiction Over Nuclear Torts.

There is no exclusive, preemptive federal court jurisdiction over tortious conduct arising out of nuclear activities. Contrary to petitioners' claim that "the [Price-Anderson] Act's adjudicatory scheme requires application of federal law to all claims of injury from nuclear materials" (Pet. 7), the Act expressly provides that in an action arising out of a "nuclear incident", the "substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent" with provisions of the Act. 42 U.S.C. § 2014(hh). This provision is totally inconsistent with any claim that the federal government's regulatory authority is exclusive over nuclear torts.

Indeed, there is no federal common law whatsoever that would apply to this case. It is not surprising, therefore, that in all of Point I of their petition (Pet. 8-13), petitioners nowhere can point to a single statute or regulation upon which they base their claim for exclusive federal regulatory authority over tort claims arising from the alleged negligent operation of a facility that handled radioactive materials.

All that the petitioners can cite is to the Tenth Circuit's *dicta* that was itself based on *dicta* from this Court's decision in *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983), as to federal preemption over "nuclear safety." (Pet. 12). However, the *Pacific Gas* language cited by petitioners did not address the relevant issues presented by a personal injury case like the present where the applicable

statute provides in relevant part that *state* law is to provide the substantive rule of decision. At issue in *Pacific Gas* were dual and potentially competing state and federal regulatory regimes, a situation that did not address the adjudicatory rights of the states, much less Indian tribes. Petitioners cannot point to any federal regulation that is implicated, much less contradicted, by the present lawsuit being heard under Navajo substantive law so long that law is not inconsistent with federal law.

B. This Court's Decision In *Strate* Is Inapplicable Here.

Petitioners' argument is also flawed due to its misplaced reliance on this Court's decision of last term in *Strate v. A-1 Contractors*, *supra*. In *Strate*, the Court addressed the interplay between the tribal exhaustion doctrine and the limits on tribal court jurisdiction set forth in *Montana v. United States*, 450 U.S. 544 (1981). Under *Montana*, tribal jurisdiction over a lawsuit involving non-tribe members can lie concerning incidents that arise on *non-Indian*-owned land within a reservation if either there is a "consensual relationship" between the defendant's activity at issue and the tribe's regulatory authority or the conduct at issue "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Strate*, 117 S. Ct. at 1409 (summarizing *Montana*).

Strate involved the adjudicatory reach of a tribal court where: (1) a controversy existed between two non-Indian parties; (2) which arose out of an accident on a State highway as to which an Indian tribe had ceded control and thus constituted "alienated, non-Indian land"; and (3) no statute or treaty authorized the tribe to govern the conduct of nonmembers on the highway in question. *Strate*, 117 S. Ct. at 1407. The Court's discussion of regulatory and adjudicatory authority upon which petitioners rely thus arose in a situation where a non-Indian was seeking to invoke tribal court jurisdiction against another non-

Indian arising out of an incident that occurred on non-tribal lands. Since the tribe had no regulatory authority over either the lands or the activity in question, it also could not have adjudicatory authority under the *Montana* analysis. Indeed, the Court stressed that the case involved a dispute that is "distinctly nontribal in nature", *id.* at 1407, and explicitly stated that its decision "express[ed] no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation." *Id.* at 1406.

Petitioners' attempt to stretch *Strate* to govern the present case will not wash. Here: (1) the underlying lawsuit is brought by members of the Navajo tribe; (2) the incidents underlying the lawsuit — injury from milling operations — took place *exclusively* on tribal lands; and (3) the tribe never divested itself of jurisdiction over either the activities at issue or the tribal land in question. The essence of the present case is that it involves personal injury claims brought by tribal Indians in their own tribal court alleging harms caused to Indians by non-Indians who entered onto the tribe's land pursuant to a consensual relationship with the tribe.

IV.

PETITIONERS IGNORE ESTABLISHED PRINCIPLES OF INDIAN SOVEREIGNTY.

Finally, even if a legitimate issue existed as to whether Congress intended absolutely to preempt state regulatory authority over tortious claims arising from the operation of a facility related to the nuclear industry, this case involves the alleged preemption of Indian rights and sovereignty, an entirely separate analysis from that concerning state governments.

"Indian tribes occupy a unique status under our law." *National Farmers Union*, 471 U.S. at 851. One important aspect

of this unique status is that Indian jurisdiction over Indian lands is absolute unless expressly limited by Congress. As this Court wrote in *Iowa Mut. Ins.*, "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty" and that "[c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless *affirmatively limited* by a specific treaty provision or federal statute." 480 U.S. at 18.

While Congress has the power to limit or abolish a tribe's sovereignty, the "Congressional intent to infringe on tribal sovereignty must be clear." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978). Because Indian tribes

> retain[] all inherent attributes of sovereignty that have not been divested by the Federal Government, *the proper inference from [Congressional] silence . . . is that the sovereign power . . . remains intact.*

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 149 n.14 (emphasis supplied); *accord Iowa Mut. Ins.*, 480 U.S. at 18; *see also United States v. Wheeler*, 435 U.S. 313, 323 (1978) (until Congress acts to diminish tribal sovereignty, "the tribes retain their existing sovereign powers"); *Smith v. Moffett*, 947 F.2d 442, 444 (10th Cir. 1991) ("Jurisdiction presumptively lies in the tribal court . . . unless Congress has expressly limited that jurisdiction."); *United States v. White*, 508 F.2d 453, 456 (8th Cir. 1974) (statutes should not be construed so as to abrogate rights of tribal self-government absent specific Congressional intent to the contrary).[5]

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5. Petitioners ignore the established rule and half-heartedly claim that in other areas Indian tribes have been implicitly held to be divested of jurisdiction (Pet. 17-18). Petitioners' cases demonstrate petitioners' error. While *dicta* in *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), discuss superannuated precedents, the Court's

(Cont'd)

If Congress wished to do so, it certainly knows how to provide for express federal jurisdiction and how to divest tribal courts of jurisdiction.[6] Since Congress did not divest Indian courts of jurisdiction to hear tort claims arising out of nuclear facilities, the Price-Anderson Act must be construed as written and not rewritten by the courts to say what petitioners believe Congress must have meant.

(Cont'd)
decision that the Federal Power Act constituted a comprehensive scheme involving Indian lands was based on the fact the Act itself specifically included "tribal lands embraced within Indian reservations." *Id.* at 118 (citing §§ 3(2) & 4(e) of Act). *Oliphant v. Squamish Indian Tribe*, 435 U.S. 191 (1978), concerned *criminal*, as opposed to *civil* jurisdiction, and in *National Farmers*, this Court specifically distinguished *Oliphant* on that ground. *See* 471 U.S. at 854-855 & n.17; *see also* PA 30a-31a. *Burlington Northern R.R. v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991), dealt solely with federal law issues and issues of tribal law or sovereignty were not presented, *compare, e.g., Burlington Northern R.R. v. Crow Tribal Council*, 940 F.2d 1239, 1245 (9th Cir. 1991) (holding that when tribal issues are presented, the application of the tribal exhaustion doctrine is "not discretionary, it is mandatory"), while *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 814 (7th Cir. 1993), dealt with a commercial contract that, by its terms, provided for non-Indian jurisdiction.

6. *See, e.g.*, 15 U.S.C. § 78(aa) (securities fraud lawsuits: "The District Courts of the United States . . . shall have exclusive jurisdiction . . . of all suits in equity and actions at law brought to enforce any liability or duty created this Chapter."); *see also, e.g.*, 42 U.S.C. § 9613(b) (environmental laws); 15 U.S.C. § 717(u) (natural gas regulation); 25 U.S.C. § 1132(e) (ERISA); 42 U.S.C. § 6903(13)(A) (CERCLA provisions specifically making Act applicable to "Indian tribe[s] or authorized tribal organization[s]"); 25 U.S.C. § 737(c) (providing that federal courts shall have exclusive jurisdiction concerning violations of law arising out of gaming activities conducted by the Alabama and Coushatta Indian Tribes of Texas); 25 U.S.C. § 1300g-6(c) (same; Yselta del Sur Pueblo tribe).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

KERR-McGEE CORPORATION
and CYPRUS FOOTE MINERAL COMPANY,
Petitioners,

v.

KEE TOM FARLEY, Individually and
on Behalf of the Estate of LUCY K. FARLEY,
CARMELITA FARLEY JOE,
and HAROLD KADY, SR., Individually and
on Behalf of the ESTATE OF JULIA MAE KADY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF AMICUS CURIAE OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

Whether an entity subject to comprehensive federal regulation may raise in federal court a claim of implied Federal preemption of tribal court jurisdiction without first exhausting tribal court remedies?

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CARMELITA FARLEY JOE,
and HAROLD KADY, SR., Individually and
on Behalf of the ESTATE OF JULIA MAE KADY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF AMICUS CURIAE OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF THE PETITION

INTEREST OF AMICUS CURIAE [1]

The Association of American Railroads ("AAR") is a trade association representing the major railroads in the United States. Its members account for approximately

[1] No person or entity other than AAR, certain of its members and counsel have made monetary contributions toward this brief, and no counsel for any party played any role in the preparation of the brief. AAR has filed with the Clerk of the Court the consents of counsel for petitioners and respondents to file this brief.

77% of the line haulage, employ 91% of the workers, and produce approximately 93% of the freight revenues of all railroads in the United States. AAR represents its member railroads before courts, agencies, and Congress in matters of common concern.

AAR has a strong interest in this case because the Tenth Circuit's decision, though addressing a dispute involving nuclear power, has serious implications for the nation's railroads. That decision applies the doctrine of exhaustion of tribal remedies inflexibly, so as to prevent a federal court from deciding, in the first instance, claims of implied federal preemption of tribal court jurisdiction. Like the nuclear power industry, railroads are subject to comprehensive federal regulation. The Tenth Circuit's misguided extension of this Court's prior precedents will prevent railroads from obtaining prompt and definitive rulings in federal court on their federal preemption claims.

SUMMARY OF ARGUMENT

The Tenth Circuit's decision illustrates a dangerous trend in federal decisions addressing the exhaustion of tribal court remedies. The Tenth Circuit held that, because a federal regulatory statute does not expressly forbid tribal court jurisdiction, the preemptive impact of the federal regulatory scheme could not be considered in federal court until after the complete exhaustion of tribal court remedies. In the Tenth Circuit's "strict view," in the absence of an express jurisdictional bar, federal courts are precluded from considering "countervailing federal concerns" in their exhaustion analysis.

This "strict view" is based on an unwarranted extension of this Court's decisions in *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). Neither of these cases dealt with preemption of tribal court jurisdiction by a comprehensive federal regulatory

scheme. Moreover, to the extent that issues of implied preemption arose in such cases, this Court analyzed them without waiting for a tribal court analysis. *See, e.g., Iowa Mutual,* 480 U.S. at 17-18 (analyzing preemptive impact of federal diversity jurisdiction). Indeed, more recently in *Strate v. A-1 Contractors,* 117 S. Ct. 1404 (1997), this Court directed that claims of implied preemption of tribal court jurisdiction arising from a federally-granted right-of-way be immediately considered by federal courts without awaiting tribal court adjudication.

The policies on which this Court's exhaustion precedents rest—the benefits of permitting tribal courts to examine and document the basis in tribal law for their own jurisdiction—do not support abstention where a highly-regulated entity raises a preemption claim based on a comprehensive federal scheme. In that circumstance, the dispositive issue will finally turn on a federal court's interpretation of the scope of federal law and not on any interpretation of tribal law. Litigants who are forced to try and appeal such cases in the tribal court system will be forced to incur unnecessary regulatory and litigation costs, as well as delay, before they can obtain an authoritative resolution in federal court.

The mistaken interpretation of this Court's precedents advanced by the Tenth Circuit has severe implications not only for nuclear energy firms, but for other regulated industries, such as the rail industry, whose operations traverse reservation lands. At least 55 Indian reservations are crossed by one or more railroad lines. These lines provide essential links for this Nation's interstate rail system and remain of undiminished importance to the flow of interstate commerce.

The rail industry's interest in this case is not abstract. In recent years, tribal authorities have increasingly sought to regulate railroads that cross reservation lands. For example, tribal ordinances have purported to regulate pas-

senger service, freight service, maintenance of freight and passenger facilities, and railroad safety. Railroads are attractive targets for tribal regulation and civil claims because they face serious practical problems in moving their track from reservation land and federal legal restraints with respect to the abandonment of service.

The railroad industry has strong claims of implied preemption: it is broadly regulated under a number of federal statutes. *See, e.g.*, Federal Railroad Safety Act, 49 U.S.C.A. §§ 20101 *et seq.* (1997 & Supp. 1997); ICC Termination Act of 1995, 49 U.S.C.A. §§ 10101 *et seq.* (1997). However, when claims implicating these statutes arise, decisions like those of the Tenth Circuit will preclude the railroads from bringing their implied preemption claims to federal court without first undergoing full-scale litigation on the merits in tribal courts. This consumes significant resources and provides no interim relief from tribal efforts to regulate railroad operations in contravention of federal statutes.

The interpretation of this Court's precedents adopted by the Tenth Circuit and other courts over the last decade is misguided. It has resulted in an overt refusal to consider, let alone properly balance, the substantial countervailing federal interests inherent in federal regulation of specific industries. This Court's intervention is necessary to delineate the appropriate factors to be considered by the federal courts in deciding whether to exercise their jurisdiction in the face of a federal preemption claim.

ARGUMENT

I. THE TENTH CIRCUIT'S DECISION IS OF SERIOUS CONCERN TO THE RAILROAD INDUSTRY

A. The Tenth Circuit Improperly Failed to Give Weight to the Federal Interest in Having a Federal Court Decide Questions of Federal Preemption

The fundamental flaw in the Tenth Circuit's exhaustion analysis is that it gave no weight to the federal interest in having a federal court decide claims of federal preemption in the absence of an express jurisdictional prohibition. Petitioners asserted that Congress' comprehensive regulation of the nuclear industry under the Atomic Energy Act ("AEA"), as amended by the Price-Anderson Act ("PAA"), 42 U.S.C. §§ 2011 *et seq.* (1994), preempted a tribal court's jurisdiction to hear "nuclear tort" claims. While conceding that this jurisdictional issue was "a close question," Pet. App. at 17a, the Tenth Circuit held that the tribal court should decide it first. In concluding that exhaustion was required, the court refused to accord any weight to the "countervailing federal concerns" under the AEA and PAA. Pet. App. at 21a. This overly "strict view" of the tribal exhaustion analysis (Pet. App. at 18a) will impede not only petitioners, but also the nation's railroads and other regulated entities, from obtaining authoritative and timely federal rulings on their preemption claims.

In the Navajo Tribal Court, respondents alleged that uranium mills operated by petitioners on Navajo reservation lands in New Mexico between 1952 and 1973 "released vast quantities of radioactive materials, causing them injuries." Pet. App. at 2a-3a. Petitioners thereafter filed a declaratory judgment action in federal district court in New Mexico, asserting that the tribal court lacked jurisdiction to adjudicate respondents' claims. Petitioners argued that the Atomic Energy Act preempted nonfederal

regulation of the nuclear industry and, more specifically, that the Price-Anderson Act provides an exclusively federal framework and forum for the prosecution of tort claims arisng from injuries allegedly sustained in a "nuclear incident." Pet. App. at 3a.

After reviewing the broad regulation of the AEA and PAA, the Tenth Circuit concluded that "[t]he PAA on its face provides the sole remedy for the torts alleged in this case. . . ." Pet. App. at 10a-11a. The Tenth Circuit then addressed petitioners' claim that the AEA and PAA preempt the tribal court's jurisdiction. The court first held that tribal court jurisdiction was not "patently violative of an express jurisdictional prohibition" of the AEA and PAA. Pet. App. at 18a (quoting *National Farmers,* 471 U.S. at 856 n.21). The court then analyzed whether it should decide petitioners' claim of implied preemption. The court conceded that petitioners' position that the PAA preempts nonfederal forums "has some force." Pet. App. at 12a. The Tenth Circuit was unwilling, however, to resolve this substantial federal issue. Instead, relying on *National Farmers* and *Iowa Mutual,* the court abstained in favor of letting petitioners' "jurisdictional challenge . . . run its course in the tribal courts" pursuant to what the Tenth Circuit called this Court's "tribal exhaustion rule." Pet. App. at 17a.

The Tenth Circuit admitted that it "at times abstains without making a detailed comity analysis," since with an apparent tribal "reservation affair there is no discretion not to defer." Pet. App. at 18a. In this case, it purported to make a comity analysis, but with factors so limited that the result was virtually preordained. The Tenth Circuit's comity analysis examined only three interests: (1) Congress' interest in supporting tribal self-government; (2) promoting judicial efficiency "by allowing a full record to be developed in the tribal court"; and (3) "obtaining the benefit of tribal expertise if further review becomes neces-

sary." Pet. App. at 18a. Because these interests were ostensibly served by an initial tribal court decision on jurisdiction, the Tenth Circuit abstained from deciding the federal preemption question. Pet. App. at 18a.

In performing this comity analysis, the Tenth Circuit *expressly* refused to consider "the strong role afforded courts in resolving Price-Anderson suits." Pet. App. at 21a. In its view, "[c]onsideration of federal jurisdictional concerns is only appropriate in the context of determining whether to engage in the comity analysis at all" (*i.e.*, only in determining whether there is an express jurisdictional provision). However, where claims of implied preemption and associated federal interests are raised, the "*National Farmers* framework does not accord countervailing federal concerns a place in the comity analysis." Pet. App. at 21a.

This misreading of this Court's prior decisions threatens to cut off appropriate access to the federal courts for railroads raising implied preemption claims. The Tenth Circuit's "strict view" of the tribal exhaustion doctrine is, unfortunately, not unique. With increasing frequency, courts of appeals are requiring exhaustion of tribal remedies with respect to federal cases raising issues of implied preemption.[2] Other circuit courts have indicated that they will also apply the exhaustion doctrine in a wholly mechanical fashion.[3] The Tenth Circuit's decision demon-

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[2] *See Reservation Tel. Coop. v. Three Affiliated Tribes of the Fort Berthold Reservation*, 76 F.3d 181, 185-86 (8th Cir. 1996) (exhaustion mandatory because federal statute apparently preempting tribal tax on telephone lines on reservation did not expressly divest tribal court of jurisdiction); *Burlington Northern R.R. v. Crow Tribal Council*, 940 F.2d 1239, 1245 (9th Cir. 1991) ("exhaustion of tribal remedies is not discretionary; it is mandatory").

[3] *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1421 (8th Cir. 1996) (exhaustion mandatory because preemptive Indian Gaming Regulatory Act does not *expressly* divest tribal court of jurisdiction); *Basil Cook Enters., Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61, 66 (2d Cir. 1997) (if none of the three exceptions under *National Farmers* applies, "exhaustion is required").

strates a disturbing and recurring interpretation under which federal interests are given no weight in determining whether a claim of implied federal preemption should be heard in federal court without first requiring exhaustion of tribal remedies.

B. The Tenth Circuit's Refusal to Consider Competing Federal Interests When Applying The Tribal Exhaustion Rule Raises Serious Concerns for the Nation's Railroads

The *Kerr-McGee* petitioners, having properly litigated their claims of express preemption in two levels of federal courts, must now litigate the question of implied preemption through at least two levels of tribal courts before obtaining a definitive resolution in a federal court. As the tribal trial court found that its jurisdiction withstands the federal regulatory scheme, petitioners must undergo a full trial on the merits and an appeal within the tribal court system before having any opportunity to present their claim of implied preemption to a federal court.

The impact of the Tenth Circuit's "strict view" is striking. For the duration of the litigation, the entity subject to federal regulation typically is exposed to local (*i.e.* tribal) regulation. This is precisely the danger against which federal preemption doctrine was designed to protect. The regulated entity also incurs the cost of litigating the case on its merits, despite the risk that the entire proceeding may ultimately be found by a federal court to be void. And, it runs the risk of a huge verdict at the hands of a jury composed solely of tribal members. *See Burlington Northern R.R. v. Red Wolf*, 106 F.3d 868, 869 (9th Cir. 1996) ($250 million verdict arising from grade crossing accident), *vacated*, 118 S. Ct. 37 (1997). It is little consolation to those who have suffered these costs that the tribal court judgment may ultimately be set aside as preempted, as they then face the prospect of the litigation beginning anew in another forum.

The operational and legal risks associated with a denial of access to the federal courts are particularly severe for the nation's railroads. Railroads are tempting targets for tribal regulation, taxation and civil liability claims. Pursuant to federal rights-of-way, one or more railroads cross the lands of at least 55 reservations in 16 states. This century-old configuration is not apt to change, since a large number of these are main rail lines that cannot be abandoned.

The members of the Association of American Railroads have already seen a number of attempts by tribes to engage in improper regulation of railroad operations on reservation lands. For example, the case of *Burlington Northern R.R. v. Crow Tribal Council,* 940 F.2d 1239 (9th Cir. 1991), dealt with a Crow Tribal Common Carrier Ordinance adopted in 1982 which established "general duties" of "railroad lines" operating on the tribe's reservations. Among other things, it: (1) authorized Crow enforcement of federal law and Crow health and safety regulations consistent with federal law; (2) required regular reservation rail service, "sufficient accommodations," and maintenance of freight and passenger facilities and authorized the tribe "to compel" compliance therewith; and (3) prohibited any railroad from discontinuing use of any facility without a hearing before the tribal regulatory commission. *Id.* at 1241.

Despite the potential for implied preemption, the Ninth Circuit ordered the railroad to exhaust its remedies in tribal court, even though no action was pending in any tribal forum. The Ninth Circuit emphasized that the district court had no discretion not to abstain from hearing the railroad's claim in deference to the tribal court. *Burlington Northern R.R.,* 940 F.2d at 1245.

The Crow tribal ordinance raised obvious preemption issues under the Federal Railroad Safety Act ("FRSA"), as amended. 49 U.S.C. §§ 20101-153 (1994). Section 20106 of the FRSA expressly preempts state regulation

of areas regulated federally, and the federal courts have given a broad interpretation to the scope of such preemption.[4] FRSA sections 20111-112 provide for enforcement by the Secretary of Transportation and Attorney General; section 20113 permits state enforcement of federal laws and regulations only if approved by the Secretary and requires the state to bring civil actions in a federal district court. *See* 49 U.S.C. §§ 20111-113 (1997). Federal regulations also specifically prescribe how states may participate in the enforcement of FRSA laws and regulations. 49 C.F.R. pt. 212 (1996). The Crow tribal ordinance, however, purports to permit Crow enforcement of health and safety regulations, without approval by the Secretary, and implicitly authorizes enforcement in tribal rather than federal court.

The preemptive scope of federal regulation of railroads extends beyond safety. The ICC Termination Act of 1995 ("ICCTA") vests "exclusive jurisdiction" in the Surface Transportation Board over the "services and facilities" of railroads and "preempt[s] the remedies provided under Federal or State law." 49 U.S.C.A. § 10501(b)(2) (1997). Both federal and state courts have uniformly held that, under this statute, all efforts by state or local governments to regulate the establishment or discontinuance of railroad facilities or services have been preempted by federal law.[5] Yet this is precisely an area covered by the earlier Crow tribal ordinance.

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[4] *See, e.g., Burlington Northern R.R. v. Minnesota*, 882 F.2d 1349, 1353 (8th Cir. 1989) (FRSA preempts state caboose law since FRSA permits "the use of end-of-train telemetry devices as substitutes for visual brakes inspection"); *Burlington Northern R.R. v. Montana*, 880 F.2d 1104, 1106 (9th Cir. 1989) (same); *Missouri Pac. R.R. v. Railroad Comm'n of Texas*, 850 F.2d 264, 268 (5th Cir. 1988) ("virtually all state regulations affecting the train itself appear preempted by federal law"), *cert. denied*, 488 U.S. 1009 (1989).

[5] *See Burlington Northern R.R. v. Page Grain Co.*, 545 N.W.2d 749, 751 (Neb. 1996) ("[s]tate courts no longer have jurisdiction

Similarly, in 1996, the Bad River Band of Lake Superior Tribe of Chippewa Indians enacted a "Railroad Safety Ordinance." This ordinance purported to regulate, among other things, the track to be used on reservation lands (a "minimum of 115 lb rail") and the "qualifications" of railroad personnel on trains crossing the reservation, notwithstanding that the FRSA and regulations promulgated thereunder regulate track safety and operation [6] and the "licensing or certification" of locomotive engineers.[7]

These examples of tribal efforts to regulate railroads underscore the seriousness with which the railroad industry views this issue. Like regulations adopted by state and local governments, tribal regulations contravene the congressional policy calling for "nationally uniform" regulation of railroads.[8] Railroads have been able to obtain some measure of protection from such burdens when imposed by state and local governments through federal precedents applying theories of express and implied preemption. *See, e.g., CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 676 (1993); *Burlington Northern R.R. v. Montana,* 880 F.2d at 1106. However, the sweeping exhaustion theory followed by the court below—which accords no weight to the federal interests at all—threatens to eliminate any timely opportunity for railroads to seek federal protection from unauthorized and inappropriate tribal regulations. Accordingly, this Court should consider whether a claim of implied preemption, such as petitioners have advanced

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to consider the practices, routes, services, and facilities of interstate rail carriers" because of preemption by ICCTA); *Georgia Pub. Serv. Comm'n v. CSX Transp., Inc.*, 484 S.E.2d 799 (Ga. Ct. App. 1997) (ICCTA preempts Georgia PSC's prohibition of CSX's reduction of staff at facility and consolidation of services).

[6] *See* 49 U.S.C. § 20142; 49 C.F.R. §§ 213.31-.37 (track roadbeds), 213.51-.63 (track geometry), 213.101-.143 (track structure).

[7] *See* 49 U.S.C. § 20135 (1994); 49 C.F.R. §§ 240.1-.411 (1996).

[8] 49 U.S.C. § 20106.

here, may properly be considered by a federal court without the need for exhaustion of tribal court remedies.

II. THIS COURT SHOULD CLARIFY THE SCOPE OF TRIBAL COURT EXHAUSTION

A. This Court's Precedent Has Been Misconstrued

The decision below represents a dramatic over-extension of this Court's precedents dealing with tribal court exhaustion. None of this Court's three cases addressing exhaustion of tribal court remedies involved a claim of preemption based upon comprehensive federal regulation. To the extent that claims of implied preemption by federal law were raised in these cases, they were actually considered by this Court without need for tribal court illumination.

This Court's precedents do not require or support the "strict view" followed by the court below. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), was a personal injury case arising from a motorcycle accident in a school parking lot on the Crow Indian reservation. The Court rejected the petitioners' claim that tribal court jurisdiction over nonmembers in tort cases was foreclosed in the same manner as criminal jurisdiction under *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). In contrast to legislation granting federal courts jurisdiction over Indian crimes, "there is no comparable legislation granting the federal courts jurisdiction over civil disputes between Indians and non-Indians that arise on . . . Indian reservations." *National Farmers*, 471 U.S. at 854. The Court instead found that it would depend upon a "careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." *Id.* at 855-56.

The Court reasoned that permitting the tribal court to make the initial examination of these issues—issues relat-

ing directly to the scope of tribal sovereignty—would be useful for several reasons. These included "tribal self-government and self-determination" and fostering "the orderly administration of justice in the federal court" based on the development of a full record in the tribal court. *Id.* at 856-57. The Court explained that exhaustion would "encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review." *Id.* at 857. Thus, the Court held that in a "case of this kind" the examination of the scope of tribal sovereignty "should be conducted in the first instance in the Tribal Court itself." *Id.* at 856.

In *Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9, 16 (1987), this Court followed much the same analysis in considering whether the federal courts should adjudicate an insurance coverage dispute that was also pending in tribal court. The courts below had dismissed the claims to permit tribal exhaustion. This Court affirmed, but not without first giving extensive consideration to the petitioner's argument that tribal court jurisdiction was impliedly preempted by the federal diversity statute. This Court resolved that question of federal law on its merits, holding that "[i]n the absence of any indication that Congress intended the diversity statute to limit the jurisdiction of the tribal courts," *id.* at 18, it would not find a limitation on tribal sovereignty. The remaining jurisdictional question—whether the tribal courts actually had jurisdiction over the third-party coverage dispute—was left to the tribal court system.

Most recently, in *Strate v. A-1 Contractors,* 117 S. Ct. 1404 (1997), this Court reviewed its exhaustion cases and reiterated that the analysis is a " 'prudential rule' . . . based on comity" and not an "unyielding requirement." *Id.* at 1410, 1413, 1411 n.7. There, the Court found that where a nonmember of the tribe was proceeding through

the reservation on a right-of-way granted by a federal statute, 25 U.S.C. §§ 323-328 (1994), the tribe had lost its "gatekeeping right," *id.* at 1414, and therefore could not assert jurisdiction over the nonmember. Though the right-of-way statute did not contain an express prohibition on tribal court jurisdiction, the Court itself concluded that, in this situation, "the otherwise applicable exhaustion requirement . . . must give way, for it would serve no purpose other than delay." *Id.* at 1416 n.14. In short, the Court recognized and applied a theory of implied preemption and directed the federal courts to apply it in future federal cases without requiring exhaustion of tribal remedies.

Thus, to the extent that claims of implied federal preemption arose in these cases, this Court considered them on their merits or indicated that they could be considered by other federal courts without first requiring exhaustion of tribal remedies. This Court has *never* dealt with tribal court exhaustion in the context of implied preemption arising from a comprehensive regulatory scheme. However, as its precedents suggest, the very policies that support tribal court exhaustion in the context of a routine personal injury or contract case argue for a prompt and definitive federal court decision in the context of a regulatory preemption challenge.

In that circumstance, it is not the *tribe's* asserted basis for jurisdiction that is in issue, but rather the scope of the *federal* scheme—the intent of Congress—that is dispositive. These are matters routinely addressed by federal courts, whereas tribal courts encounter them infrequently, if at all. Moreover, as the case before the Court demonstrates, analysis of a claim of implied preemption of tribal court jurisdiction does not usually call for a review of tribal law, and rarely requires an extensive factual record. If the federal scheme fully occupies the field, the precise

basis for tribal court jurisdiction will be largely irrelevant.[9]

Nor is referral of such matters to tribal courts consistent with the orderly administration of justice. Given that *express* preemption claims may properly be heard immediately in federal court, a flat refusal to hear *implied* preemption claims until after litigation of the merits in tribal court is hugely wasteful of the resources of both court systems, as well as the time and assets of the litigants. The Tenth Circuit's approach to preemption is *dis*-orderly—a formula for unending, multi-court litigation. Indeed, even the policies supporting tribal autonomy are implicated to a lesser degree when the decisive questions are the scope and intent of a federal regulatory scheme rather than identification of the limits of tribal sovereignty. These are issues on which federal courts will obviously have the last word. A dry run of these issues in tribal court seems pointless and ultimately corrosive of true tribal court autonomy.

This Court has recognized that its precedent concerning the exhaustion of tribal remedies has been "variously interpreted." *Strate*, 117 S. Ct. at 1413, 1411 n.7. Tribal court exhaustion was designed to permit tribal courts to illuminate questions of tribal law and identify the bases for tribal court jurisdiction. However, when a tribal claim or regulation encroaches into areas heavily regulated by federal law, substantial federal interests independent of those that support tribal self-determination come into play and must be considered when deciding whether exhaustion of tribal remedies is necessary. The Tenth Circuit not only interpreted this Court's precedents as not requiring

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[9] *See, e.g., California Fed. Savs. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280-81 (1987) ("[c]ongressional intent to pre-empt state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation.") (citation omitted); *Pennsylvania R.R. v. Public Serv. Comm'n*, 250 U.S. 566, 568 (1919).

such consideration; it held that they forbid it. Pet. App. at 21a. This interpretation deserves further review by this Court.

B. This Petition Provides a Vehicle for Developing a More Flexible Exhaustion Doctrine

This Court should clarify the guidelines for analyzing claims of federal preemption of tribal court jurisdiction. This case provides an ideal vehicle for this purpose. The federal regulatory scheme in question is comprehensive and reflects a vital national interest. The Court already has the benefit of extensive decisions from both the federal and tribal court systems. If this case is not taken, litigants in other cases dismissed on grounds of exhaustion may choose not to press their claims to the appellate level, leaving the core problem unresolved and unreviewable for years.[10]

This case offers an opportunity for this Court to clarify the fundamentals of exhaustion analysis as applied to tribal courts. Consideration of competing interests is inherent in any comity analysis. *See, e.g., Hilton v. Guyot*, 159 U.S. 113, 164 (1895); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 818 (1976) (important considerations are "wise judicial administration," "conservation of judicial resources" and "comprehensive disposition of litigation"), *cited in Iowa Mutual*, 480 U.S. at 16 n.8; *Younger v. Harris*, 401 U.S. 37, 44 (1971). Nothing in such an analysis conflicts with this Court's admonition in *National Farmers* that "the existence and extent of a tribal court's jurisdiction will require a careful

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[10] Certainly, the substantive questions of preemption raised by this petition will not be available for decision by the federal courts until verdicts have been rendered in the tribal courts, appealed within the tribal system, and then challenged and appealed within the federal system. Even then, the exhaustion issue raised here will likely be moot, and may not be capable of resolution by this Court.

examination of tribal sovereignty . . . [and] a detailed study of relevant statutes, Executive Branch Policy . . . and administrative or judicial decisions." *National Farmers*, 471 U.S. at 855. In fact, where substantial countervailing federal interests are involved, *National Farmers* seems to require—not forbid—consideration of those interests.

This Court's precedents call for a "prudential" balancing of federal interests when deciding whether a tribal or federal court should first address the reach of the tribal court's jurisdiction. The Tenth Circuit held that such a balancing is forbidden even where federal law almost surely preempts tribal law. Because railroads and members of the many other federally-regulated industries, including petitioners, will suffer injury if such a misreading of this Court's precedents continues, this Court should take this opportunity to clarify the law of exhaustion of tribal court remedies.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

KERR-MCGEE CORPORATION
and CYPRUS FOOTE MINERAL COMPANY,
Petitioners,
v.
KEE TOM FARLEY, Individually and
on Behalf of the Estate of LUCY K. FARLEY,
CARMELITA FARLEY JOE,
and HAROLD KADY, SR., Individually and
on Behalf of the ESTATE OF JULIA MAE KADY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICI CURIAE* OF THE MONTANA SCHOOL BOARDS ASSOCIATION AND D.H. BLATTNER & SONS, INC. IN SUPPORT OF THE PETITION

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IN THE

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BRIEF *AMICI CURIAE* OF THE MONTANA SCHOOL BOARDS ASSOCIATION AND D.H. BLATTNER & SONS, INC. IN SUPPORT OF THE PETITION

The Montana School Boards Association ("MSBA") and D.H. Blattner and Sons, Inc. ("Blattner") respectfully submit this brief *amici curiae* pursuant to S. Ct. R. 37 in support of the petition for writ of certiorari.[1] Letters

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[1] Counsel for the parties did not participate in the drafting of this brief, and no one other than the *amici curiae* made a monetary contribution to its preparation or submission.

of Consent from counsel for all parties have been filed with the Clerk.

INTEREST OF *AMICI CURIAE*

A. Montana School Boards Association

MSBA is a voluntary association whose membership is comprised of approximately three hundred (300) public school boards in the State of Montana. The stated goal of MSBA is to promote the best education possible for the children of Montana with the resources that are available. MSBA has been active on the state level since 1926 in examining problems relating to public education and in seeking resolutions to those problems.

Each member school board is made up of a varying number of trustees, with annual elections conducted to fill staggered three-year terms. *See* §§ 20-3-301, 20-3-304, MCA. The school boards are constitutionally vested with the supervision and control of the individual schools within their respective school districts. *See* Montana Constitution, Art. X, Sec. 8. The school districts themselves are, in turn, political subdivisions and instrumentalities of the State of Montana. *Teamsters, Chauffeurs, Warehousemen and Helpers, Local #45 v. Cascade County School District No. 1*, 162 Mont. 277, 511 P.2d 339, 341 (1973). Of the approximately 300 MSBA-member school boards, 27 are charged with the supervision and control of school districts whose geographical boundaries include territory lying within the exterior boundaries of one or more of the seven federal Indian reservations in the State of Montana.

Concomitant with their constitutionally-vested control and authority, school boards are subject to extensive regulation and control by the Montana Legislature, the Montana Board of Public Education and the Montana Office of Public Education. They are, of course, subject to extensive federal regulation in certain areas as well. Aspects of that regulatory framework are directly mani-

fested in the form of established procedures designed solely for the purpose of resolving disputes that may arise as a result of actions taken by a school board, the district it governs, or a school or school official within that district.

For example, Montana has a specific administrative procedure for the resolution of "matters of controversy" that arise ". . . [as a result of the decisions of a school board] . . ." *See* § 20-3-210, MCA; § 10.6.101 *et seq.*, ARM. Examples of the types of disputes that can conceivably fall within the ambit of that process include such things as student discipline matters, student transportation disputes, etc. This process involves a *de novo* administrative hearing concerning the disputed school board action subject to a subsequent process of administrative and judicial review. The Montana Supreme Court has held that, except in very limited circumstances, aggrieved parties in "school controversy" matters are required to exhaust this administrative process prior to pursuing such claims in state district court. *See e.g., Canyon Creek Education Association v. Board of Trustees, Yellowstone County School Dist. No. 4*, 241 Mont. 73, 785 P.2d 201, 203 (1990).

The procedure for dealing with dismissal of teachers from employment is also governed by its own administrative procedure and provides another example. *See e.g.*, §§ 20-4-204, 20-4-207, MCA. Finally, another example involves the resolution of disputes concerning the provision of special education under federal law, which are also subject to a mandated administrative process that must be exhausted. *See e.g.* 20 U.S.C. § 1415.

Thus, an individual aggrieved by decisions of a Montana school board has immediate access to specific procedures tailored to address such disputes. These state and federal administrative procedures are mandatory and the resulting decisions are subject to judicial review.

Nevertheless, Montana school boards and school districts are frequently sued in tribal courts over the manner in which they conduct their affairs. MSBA estimates its School Boards and the Districts they represent have been sued in tribal courts in actions similar to the examples provided below more than fifty (50) times in the last three years. Largely because of the operation of the exhaustion doctrine at issue in this case, these school districts and their elected boards find their ability to govern the district, even their ability to use their expertise to best provide educational opportunities to their students, undermined and compromised.

In one case, a school board voted to expel a sixth grade student after her violent assault on a younger student. The expelled student and her parents first appealed the decision through the state administrative procedures. Growing impatient with that, they sought to overturn the expulsion and to force her immediate readmittance by suing the school district in tribal court. At a hearing in May of this year, the tribal court refused to dismiss the matter for want of jurisdiction based on *Strate, et al. v. A-1 Contractors, et al.*, —— U.S. ——, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997), ordered an evaluation of the student for special needs even though district personnel had already considered and rejected that course of action, and ordered the readmittance of the student. The school district, under threat of enforcement of the tribal court's order, had to assemble an evaluation team and expend money and time to conduct an evaluation it deemed unnecessary, a judgment the results proved. Most importantly, it also had to re-admit the student to the same classroom her victim was in.[2]

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[2] After the tribal court refused to dismiss the action and, perforce, after it complied with the tribal court's oral orders, the District instituted a federal declaratory judgment action to prevent further tribal court intervention in its governance of schools. *Glacier County School District No. 50 v. Galbreath, et al.*, No. CV-

In another case, a teacher sued a school district in tribal court for allegedly discriminating against her in its hiring process. The plaintiff claimed that (1) she was entitled to a state-law hiring preference based on her alleged "handicapped" status and (2) she was entitled to a hiring preference because she was Native American. Apart from the fact that the state-law handicapped "preference" upon which the plaintiff's claim was based does not apply to school districts, it contains its own specific enforcement scheme in state court. *See* § 39-30-207, MCA. This represents another instance of the exhaustion doctrine facilitating a party's desire to circumvent the procedures in state law for resolving their disputes with a school board. Consequently, in the face of the exhaustion doctrine and the limited financial resources of small school districts in Montana, this school district decided it cannot afford to pursue a challenge to the tribal court's jurisdiction and must litigate the matter in tribal court.

B. D.H. Blattner & Sons, Inc.

Blattner is a Minnesota corporation, the primary business of which is the construction and re-construction of state and federal highways. In the course of this work, Blattner has bid on projects throughout the West and midwest. Most of these states contain Indian reservations.

In 1996, Blattner bid on and won a contract with Montana to do construction work on a portion of U.S. Highway 2 that is within the exterior boundaries of the Blackfeet reservation. Montana had constructed the highway and since then has maintained it. The State owns the easement over which this highway runs, the federal government having granted the right of way under 25 U.S.C. § 311. *See Wilson v. Marchington*, —— F.3d ——, 1997 WL 583704 (9th Cir. 1997). On the project, an

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97-061-GF. The federal court ruled in favor of the district December 8, 1997. The tribal defendants have moved for reconsideration, in part on grounds of mootness.

employee of a subcontractor for Blattner suffered a work-related injury covered by Montana's worker's compensation laws. That gentleman and his wife and children, however, also sued Blattner and the State in Tribal Court seeking additional remedies, including punitive damages. The plaintiffs are tribal members.

Blattner and the State moved to dismiss the tribal court action for lack of jurisdiction. They also sought preliminary injunctive relief from the federal district court in Montana. The tribal court denied the motions, finding that it has jurisdiction by virtue of the fact that the plaintiffs are tribal members. It distinguished this Court's decision in *Strate*, 117 S.Ct. 1404 (1997), on that basis. It pointed out that each of the three levels of the Blackfeet tribal court system had already addressed the issue and found in favor of tribal court jurisdiction. As in the case before the Court in the instant Petition, there is no means of appealing this ruling within the tribal court system prior to a trial on the merits.

Blattner and the State argued to the federal district court that the tribal court clearly lacks jurisdiction over them under this Court's decisions, most recently, *Strate*, 117 S.Ct. 1404. *State of Montana and D.H. Blattner & Sons, Inc. v. Bremner*, 971 F.Supp. 436 (D.Mont. 1997). In addition, they argued they are not required to exhaust tribal remedies under the doctrine established in *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 85 L. Ed. 2d 818, 105 S.Ct. 2447 (1985) and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 107 S.Ct. 971, 94 L. Ed. 2d 10 (1987). Blattner argued not only that the holding of *Strate* made it plain the Tribal Court lacks jurisdiction but also that the Court's outline of the applicability of the exhaustion doctrine in footnote 14 of *Strate* clearly showed exhaustion was not required. *Strate*, 117 S.Ct. at 1415, n.14.

Unlike the Court of Appeals in this case, the district court did not dismiss the applicability of the Court's dis-

cussion of this doctrine in *Strate*. It recognized Blattner and the State are non-tribal entities and that their activity at issue took place on non-tribal land, thus bringing this case within the "main rule" stated in *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L. Ed. 2d 493 (1981). *Montana v. Bremner*, 971 F. Supp. at 437. However, it held that the fact the plaintiffs are tribal members distinguished the suit against Blattner from *Strate*, and it ruled that injury to one tribal member suffices to meet the requirements of the second exception to *Montana*'s main rule. *Id.* at 437-438. Consequently, the district court found *Strate* inapplicable and required Blattner to exhaust all tribal remedies prior to seeking relief in federal court. *Id.* at 439.[3] Thus, because of this rigid application of the exhaustion doctrine, Blattner is faced with protracted litigation on the merits in tribal court before it can receive relief on the jurisdictional issue from a federal court.

These *amici* urge the Court to review the Petition here because in doing so it can clarify, for them and many other litigants, the workings of the tribal exhaustion doctrine, thereby saving these litigants, tribal courts, and federal courts great amounts of judicial and litigant resources.

ARGUMENT

I. A MECHANISTIC APPLICATION OF THE EXHAUSTION DOCTRINE, IN CONFLICT WITH THIS COURT'S DIRECTION, RESULTS IN INCURSIONS ON IMPORTANT ASPECTS OF FEDERALISM.

1. The scope of a tribe's retained inherent sovereign authority is a federal question, over which federal courts

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[3] Blattner and the State appealed the ruling to the Ninth Circuit Court of Appeals. *State of Montana and D.H. Blattner & Sons, Inc. v. Bremner*, No. 97-35798 and No. 97-35816. That appeal is pending. The tribal court denied a motion to stay its proceedings during the federal court action. The parties there are now engaged in discovery.

have unquestioned jurisdiction. *National Farmers*, 471 U.S. 845, 849, 28 U.S.C. § 1331. In a series of cases, the Court developed an analytical model to determine whether in a particular situation a tribe retained authority over nonmembers in light of its incorporation into the United States. *Strate, et al. v. A-1 Contractors, et al.*, —— U.S. ——, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997), *South Dakota v. Bourland*, 508 U.S. 679, 113 S.Ct. 2309, 124 L.Ed.2d 606 (1993), *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 109 S.Ct. 2994, 106 L.Ed.2d 343 (1989), *Montana*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978), *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209, (1978). Federal courts have an almost unflagging obligation to exercise their jurisdiction. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). In addition to their role as the guardian of federal rights, *Steffel v. Thompson*, 415 U.S. 452, 463, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974), this obligation arises from the fact that the resolution of federal issues often depends on the underlying facts. "How the facts are found will often dictate the decision of federal claims." *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 416-417, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964).

2. *Amici* assert the application of the doctrine requiring the exhaustion of tribal remedies should be clearly delineated and closely cabined to protect fundamental interests, such as the federalism interests so often implicated in cases such as this one. Mechanistic obeisance to assertions of tribal jurisdiction, even when such assertions, as here, appear implausible under controlling decisions of this Court, sacrifices these interests as a practical matter. *Amici* do not suggest the federal policies identified in *National Farmers* and *Iowa Mutual* as supporting a pru-

dential rule of deference to tribal courts, in the proper case, do not require federal courts' full consideration. Nor do they suggest these decisions should be reversed or reduced. Congress has in fact fulsomely supported the flowering of tribal governments and courts. Congress has recognized and helped fund their role in protecting and exercising existing tribal sovereignty.

But in doing so Congress has not expanded tribal sovereignty. Nor can it be implied that it had the objective, in supporting tribes and their courts, to promote the violation of federal laws limiting tribal jurisdiction over nonmembers by allowing tribes to "assert and protect excessively claimed sovereignty," *Yellowstone County v. Pease*, 96 F.3d 1169, 1175, n. 5 (9th Cir. 1996), *cert. denied, Pease v. Yellowstone County*, —— U.S. ——, 117 S.Ct. 1691 (1997), from meaningful challenge by using the doctrine of exhaustion of tribal remedies as a shield for such tenuous assertions. The prudential exhaustion doctrine these congressional policies support was never intended to prevent federal courts from actually analyzing the competing interests and the legal basis of the assertion of tribal jurisdiction. But in many cases, including this one, that is precisely what has occurred. *Texaco v. Zah*, 5 F.3d 1374 (10th Cir. 1993), *Crawford v. Genuine Parts Co.*, 947 F.2d 1405 (9th Cir. 1991), *Reservation Telephone Cooperative v. Three Affiliated Tribes*, 76 F.3d 181 (8th Cir. 1996), *Burlington Northern R.R. v. Crow Tribal Council*, 940 F.2d 1239 (9th Cir. 1991), *Basil Cook Enters., Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61 (2d Cir. 1997). There are decisions in conflict with this trend, *Altheimer & Gray v. Sioux Manufacturing Corp.*, 983 F.2d 803 (7th Cir. 1993), *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community*, 991 F.2d 458 (8th Cir. 1993), a sufficient reason to grant the writ in itself, but they are in the minority, an even better reason to grant the writ.

3. To avoid the practical nullification of vital elements of federalism, whether the clear import of federal acts or

the free use of a State's sovereign authority to operate schools or repair roads, this doctrine must be applied with sensitivity to these fundamental state and federal interests and to the viability of the particular assertion of tribal authority, whether regulatory or adjudicatory, at issue. Assertions of excessive jurisdiction unsupported by the law as established by this Court cannot create tribal sovereignty where it does not exist, *Yellowstone County v. Pease*, 96 F.3d 1169, 1175, n.5 (9th Cir. 1996), *cert. denied, Pease v. Yellowstone County*, —— U.S. ——, 117 S.Ct. 1691 (1997), quoting with approval *A-1 Contractors v. Strate*, 76 F.3d 930, 940 (8th Cir. 1996) (en banc); *and see South Dakota v. Bourland*, 508 U.S. at 695, n.15, and should not be shielded from efficient disposition by federal courts. It would not further Congress' policies to require federal courts to defer to tribal courts and administrative agencies on federal questions where it appears under applicable federal law the tribe either simply cannot have jurisdiction or must make such an exceptional factual showing to establish its "very narrow" authority over nonmembers (*County of Yakima v. Confederated Tribes and Bands of the Yakima Nation*, 502 U.S. 251, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992)) that success is unlikely.

Thus, in cases where it is plain that, in all likelihood, the tribe lacks the asserted jurisdiction, the model outlined in *Strate* at footnote fourteen (14) for deciding this issue and not requiring exhaustion of tribal remedies should be applied. There, the Court noted that when the issue concerns assertions of tribal jurisdiction over nonmember conduct on non-tribal land, *Montana*'s "main rule" applies —that is tribes generally lack authority over the conduct but for exceptional circumstances—and exhaustion would serve no purpose other than delay. This does not preordain the outcome of a challenge to a tribe's assertion of jurisdiction over nonmember conduct on non-tribal land. It does recognize, however, that such an assertion

runs counter to the general rule, that for the assertion to be made good the tribe will have to make a very strong factual showing under one of the *Montana* exceptions, and that, particularly since the issue is factually dependent, the federal court should make the factual findings to resolve the federal question. *England*, 375 U.S. at 416-417.

4. The workings of the tribal exhaustion doctrine in this case as well as those in which tribal sovereignty over nonmember conduct on non-tribal land has been asserted raise important issues of federalism. Here it is evident that vital federal interests, such as the efficient working of the nuclear regulatory and remedial scheme, are at stake. Just as important from a federal constitutional perspective are the federalism interests implicated by incursions into and erosions of a State's sovereignty by excessive assertions of tribal jurisdiction shielded from efficient examination and disposition by this doctrine.

The mechanistic application of this doctrine upsets these interests, eroding, perhaps evading the governmental power and responsibility from which they derive. On the one hand, it requires the Petitioners here to defend, on the merits, nuclear torts which Congress plainly intended to be litigated in federal courts if the Defendant so wished. On the other hand, it requires School Districts and companies that have contracted with a State to repair and construct highways to engage in a full litigation on the merits in tribal court of actions arising from their conduct on non-tribal land. Indeed, in the case of School Districts, it requires them to proceed through this protracted process while refraining from actions they believe they can and should take under state law—for example, the expulsion of a violent student—to safeguard the health and welfare of the other students.

Meaningful federalism requires constant attention to maintain the delicate balance between national requirements and significant independent freedom of governance on the part of states. *New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408, 120 L.Ed.2d 120 (1992). The

federal system established in the Constitution does not provide a role for Indian tribes as sovereign governing entities. The exercise of their existing jurisdiction within limits established by law presents its own, not insurmountable, difficulties. The practical difficulties of maintaining the reality of a vibrant federalism between the states and the federal government would be magnified literally three or four hundred times if tribes were found as a general matter to possess inherent sovereign power, contrary to the strong presumption, over nonmembers. But that, of course, is not the general rule. *Montana v. United States*, 450 U.S. 544 (1981). Quite the contrary. *Strate*, 117 S. Ct. 1404. If the plain rules could be efficiently applied to excessive claims of tribal sovereignty, tribes' existing, pre-constitutional power, unfettered by either state or federal constitutional concerns, would co-exist more readily with the powers established in the Constitution.

II. THE BENEFITS OF THIS COURT'S DECISIONS DELINEATING THE CONTOURS OF TRIBAL JURISDICTION ARE FRUSTRATED AND UNREALIZED BY LITIGANTS AND COURTS AS THE RESULT OF THE INFLEXIBLE APPLICATION OF THIS DOCTRINE.

1. The Court's decisions in the last two decades have brought a great degree of clarity to the question of the scope of tribal inherent sovereignty over nonmembers and their activities in a variety of situations. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), *United States v. Wheeler*, 435 U.S. 313 (1978), *Montana v. United States*, 450 U.S. 544 (1981), *Merrion v. Jicarrilla Apache Tribe*, 455 U.S. 130, 102 S. Ct. 894, 71 L.Ed.2d 21 (1982), *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), *South Dakota v. Bourland*, 508 U.S. 679, *Strate, et al. v. A-1 Contractors, et al.*, 117 S. Ct. 1404. For example, only last term the Court found its decisions so clear as to the probable outcome of jurisdictional disputes when the issue concerns whether a tribe retains sovereign authority over nonmember activity on non-tribal land within a reser-

vation—that is, land covered by *Montana*'s "main rule"—that it declared exhaustion of tribal remedies unnecessary. *Strate*, 117 S. Ct. 1404, n.14.

However, the application of the general rules, including clear pronouncements of this Court, has been obstructed not only by claims of excessive jurisdiction on the part of tribes, which the federal courts should be able to analyze and decide in a timely manner, but also by a mechanistic application of the doctrine at issue here. Because of this, the Court's clear decisions and its vigilance in matters of federalism are left unapplied. Even though the applicable substantive rules for resolution of this federal question aim in large part at preserving the important federalism interests implicated by tribes' excessive assertions of authority, economic, jurisprudential, and governmental 'balkanization" far more fragmenting than any possible among the States takes place by default, while litigants either exhaust tribal remedies or give up the defense of these interests in the face of the costs of this doctrine.

In almost all the reported cases neither litigants nor courts, whether tribal, state, or federal, have received the benefit of this clarity in the Court's decisions in terms of an efficient, timely disposition of the issue. Indeed, the *Strate* case itself consumed 6 years of litigant and court resources exhausting remedies in tribal courts, including a tribal appellate court lacking any connection at all to the nonmember defendants in the case except that the tribe in whose court they were sued had elected to be a part of that voluntary judicial review system. In that case, at least, the Respondents had the good fortune of dealing with a court system that would deal with the jurisdictional issue at the outset and allow an appeal of that determination. In the instant case and in many others, the tribal courts do not allow interlocutory appeals of jurisdictional determinations. Thus, whereas it took *Strate* 6 years to be resolved, it may easily take twice as long and cost ten times as much to fully try a case on the merits in order

to reach the point where the Court's decisions, such as *Strate,* will be applied.

This has left many litigants in an untenable position. Some, such as Burlington Northern Railroad in *Burlington Northern Railroad v. Red Wolf,* 106 F.3d 868 (9th Cir. 1997), Kleinfeld, J. dissenting, *certiorari* granted, judgment vacated and remanded, *BNRR v. Red Wolf,* —— U.S. ——, 118 S.Ct. (1997), are constrained to pursue the jurisdictional challenge to the end. But many litigants cannot afford to protect their rights, and they are truly exhausted by this doctrine. For example, one School District, the elected Board of which is an MSBA member, has routinely decided not to challenge the tribal court's jurisdiction over its affairs, not because the substantive law is against it but because of the mechanistic application of the exhaustion doctrine.

CONCLUSION

Petitioner stated compelling reasons to grant the requested writ. The federal regulatory scheme is pervasive and the national importance of both that regime and uniformity in its application cannot be overstated. Congress' entrustment of the issues raised by the underlying case to a well-defined federal remedial system, and the policy goals that system advances, would be defeated if it is not plain that these acts eliminated any tribal authority over these issues. *Amici* respectfully suggest the instant Petition presents the opportunity for the Court to establish the clear rules necessary for litigants and courts to understand when they must litigate the issue through a tribal system and when the issue of jurisdiction can first be decided in a federal court prior to exhausting all tribal remedies. If this opportunity is taken and fully developed, not only litigants but tribal and federal courts would see their time better spent on the merits of these issues rather than on protracted preliminary skirmishes over the application of this doctrine.

Respectfully submitted,

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No. 97-705

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

KERR-MCGEE CORPORATION
AND CYPRUS FOOTE MINERAL COMPANY,

PETITIONERS,

V.

KEE TOM FARLEY, INDIVIDUALLY AND
ON BEHALF OF THE ESTATE OF LUCY K. FARLEY,
CARMELITA FARLEY JOE,
AND HAROLD KADY, SR., INDIVIDUALLY AND
ON BEHALF OF THE ESTATE OF JULIA MAE KADY,

RESPONDENTS.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

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ARGUMENT

This case presents the question whether a party sued in tribal court must exhaust its tribal court remedies when it is plain that the tribal court may not exercise jurisdiction over the cause of action. In *Strate v. A-1 Contractors*, ___ U.S. ___, 117 S. Ct. 1404, 1416 n.14 (1997), this Court held that where "tribal courts lack adjudicatory authority" over a dispute, requiring exhaustion "would serve no purpose other than delay." Certiorari is warranted because the decision of the Tenth Circuit is flatly inconsistent with *Strate* and because the issue is of great practical importance. Respondents' attempts to deflect attention from the central flaws in the court of appeals' decision are unavailing.

1. Respondents contend (Br. in Opp. 4) that petitioners are not prejudiced because petitioners will eventually have an opportunity — after the trial and appellate proceedings in the tribal court system have been concluded — to obtain federal court review of the question of tribal court jurisdiction. That contention misses the point.

a. The issue of tribal court jurisdiction is fully ripe for review now. Resolution of that issue turns on whether the federal government's pervasive regulation of the field of nuclear health and safety in the Atomic Energy Act, as amended ("AEA"), and Congress' creation of the exclusive federal adjudicatory scheme in the Price-Anderson Act, as amended ("PAA"), foreclose tribal courts from exercising jurisdiction over nuclear torts.

There is no reason to await the development of evidence in the tribal court because no factual record is necessary to decide this purely legal issue. Moreover, the tribal court has no expertise in federal law. It thus can offer no legal analysis that could conceivably assist the federal courts in assessing the harm to the federal interests that would result from allowing

tribal courts to adjudicate claims of injury from nuclear materials.

Because the tribal court can contribute neither fact finding nor relevant legal analysis, requiring exhaustion "would serve no purpose other than delay." *Strate*, 117 S. Ct. at 1416 n.14. Here, as in *Strate*, postponing a decision by the federal courts on the jurisdictional issue would accomplish nothing except waste the resources of both the courts and the parties.

b. Respondents overlook the fact that the exhaustion issue presented by the petition will no longer be available for review if petitioners are required to exhaust their tribal court remedies. Petitioners have an undisputed right to a federal court determination of whether the tribal courts may properly exercise jurisdiction over respondents' claims. But that jurisdictional issue is separate from the issue of whether petitioners must first exhaust tribal court remedies. The latter issue will become moot if petitioners are forced to undergo unnecessary tribal court proceedings at two levels — trial and appeal — before they can obtain federal court review of the propriety of the tribal court's exercise of jurisdiction in the first instance.[1]

2. Respondents understandably attempt to minimize the force of this Court's holding in *Strate*. Pointing to the "express jurisdictional prohibitions" language of *National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845, 856 n.21 (1985), respondents argue that tribal exhaustion is required here because there is no explicit statement in either

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[1] *See, e.g., Church of Scientology v. United States*, 506 U.S. 9, 12 (1992) (citations omitted) ("a federal court has no authority to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it").

the AEA or the PAA divesting tribal courts of jurisdiction over nuclear tort claims. Br. in Opp. 5-6.

But *Strate* abandoned the stringent "express prohibition" standard of *National Farmers*. No federal statute expressly barred the exercise of tribal jurisdiction in *Strate*. Yet, the Court held that when "it is plain" that a tribe lacks authority to regulate a nonmember's conduct, "it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct." *Strate*, 117 S. Ct. at 1416 n.14. In such a situation, when tribal court jurisdiction is challenged in federal court, "the otherwise applicable exhaustion requirement must give way." *Id.*

Here, as shown in the petition, "it is plain" from the comprehensive federal regulatory scheme of the AEA that Indian tribes have no authority to regulate nuclear health and safety matters. It follows inexorably from *Strate* that tribes also lack authority to adjudicate tort claims that place such matters at issue. Likewise, "it is plain" from the PAA that tribal courts are without authority to adjudicate nuclear tort claims, which the PAA designates as exclusively federal causes of action. Allowing tribal courts to adjudicate nuclear tort claims would clearly be inconsistent with the PAA's adjudicatory framework, including its provisions allowing for removal and consolidation of all such claims in federal court.

3. Respondents contend that petitioners have overstated the federal interests that are implicated by the tribal court's exercise of jurisdiction over respondents' nuclear tort claims. They argue (Br. in Opp. 3, 7-9) that the petition misstates the role of the states in regulating nuclear safety matters under the AEA and the role of state substantive law under the PAA's adjudicative scheme. This argument, too, is seriously mistaken.

a. Respondents erroneously assert that "[t]he federal government *does not* 'exercise exclusive authority to regulate nuclear safety' . . . and petitioners can cite no statute or regulation to support their contention." Br. in Opp. 3 (citation omitted). The AEA's pervasive regulatory scheme leaves no room for either the states or Indian tribes to regulate matters of nuclear safety and health.

Under the AEA, the role of the states in regulating nuclear safety is clearly circumscribed. The AEA permits the states to exercise regulatory authority over nuclear materials only with permission of the Nuclear Regulatory Commission ("NRC") and only in limited circumstances. *See* 42 U.S.C. § 2021. Specifically, the AEA authorizes the NRC, with certain exceptions, "to enter into agreements with the Governor of any State providing for discontinuance of the [NRC's] regulatory authority" with respect to certain nuclear "materials within the State." *Id.* § 2021(b). The NRC's regulations provide that, under this system, "the individual States may not, in the absence of an agreement with the [NRC], regulate the materials described in the Act from the standpoint of radiological health and safety." 10 C.F.R. § 8.4(a) (1997). Thus, as this Court has held on numerous occasions, "the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States." *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 212 (1983); *see also, e.g., English v. General Elec. Co.*, 496 U.S. 72, 80-82 (1990).

By focusing on the now abandoned "express prohibition" phrase from *National Farmers*, respondents appear to be arguing that Congress' failure to mention Indian tribes in the AEA creates a regulatory gap, and that it therefore must be assumed that tribes can exercise regulatory authority over radiological health and safety issues. Respondents have things

backwards. If Congress has enacted general legislation that entirely federalizes a field of regulation and preempts the states from exercising regulatory authority, then that legislation will have a similar preclusive effect on Indian tribes.[2] Here, Congress has given the federal government exclusive and comprehensive authority over the field of nuclear health and safety. Accordingly, there is no room for the tribes to regulate such matters.

This Court's analysis of claims of federal preemption of state law is instructive. In the preemption context, as in the context of determining whether the exercise of tribal authority has been foreclosed, the objective is to discern congressional intent.[3] As the Court noted recently, "[s]ometimes courts, when facing the pre-emption question, find language in the federal statute that reveals an explicit congressional intent to pre-empt state law. More often, explicit pre-emption language does not appear, or does not directly answer the question. In that event, courts must consider whether the federal statute's 'structure and purpose,' or nonspecific statutory language,

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[2] *See Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960) ("it is now well settled . . . that a general statute in terms applying to all persons includes Indians and their property interests"). *See also, e.g., Reich v. Mashautucket Sand & Gravel*, 95 F.3d 174, 179 (2d Cir. 1996) (citation omitted) ("tribal power, even regarding exclusively internal conflicts, may be limited by treaty or federal statute, . . . including statutes that are silent as to Indians"); *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 932 (7th Cir. 1989) ("[g]eneral statutes . . . whose concerns are widely inclusive and do not affect traditional Indian or Tribal rights, are typically applied to Indians").

[3] *See, e.g., Barnett Bank v. Nelson*, 517 U.S. 25, 116 S. Ct. 1103, 1107 (1996) (question whether federal statute preempts state statute "is basically one of congressional intent"); *Smart*, 868 F.2d at 932 ("Congressional intent is paramount in determining the applicability of a statute to Indian Tribes").

nonetheless reveal a clear, but implicit, pre-emptive intent." *Barnett Bank v. Nelson*, 517 U.S. 25, 116 S. Ct. at 1107-08 (citations omitted).

Congress' intent in the AEA to make federal authority exclusive and to oust state authority is crystal clear, and so is the consequence for tribal jurisdiction: just as the states are deprived of authority to regulate matters of nuclear health and safety, so too are Indian tribes. Accordingly, tribes may not adjudicate nuclear tort claims because, as *Strate* holds, where there is no authority to regulate, there is no authority to adjudicate. *Strate*, 117 S. Ct. at 1413.

Respondents suggest (Br. in Opp. 10-12) that principles of tribal sovereignty differentiate this case from cases involving federal preemption of state regulatory authority. But whatever the scope of tribal sovereignty in the absence of federal limitation, this Court has from its earliest days recognized that tribal authority is subject to congressional regulation and diminution. *See, e.g., National Farmers*, 471 U.S. at 851 ("the power of the Federal Government over the Indian tribes is plenary"). Congress, by making regulation of nuclear safety the exclusive domain of the federal government, has unambiguously foreclosed the exercise of tribal jurisdiction. Under *Strate*, therefore, the court of appeals erred in requiring petitioners to exhaust tribal remedies.

b. Respondents flatly assert that the "proposition that the federal government's regulatory authority is exclusive" is "absolutely inconsistent" with the PAA which, according to respondents, "expressly provides that cases involving injury from nuclear incidents are to be governed by substantive *state* law." Br. in Opp. 3 (citing 42 U.S.C. § 2014(hh)). Respondents have simply misunderstood the PAA scheme.

The PAA states unequivocally that any "public liability action" — *i.e.*, any nuclear tort action — "shall be deemed to be an action arising under [the PAA]." 42 U.S.C. § 2014(hh). Thus, any claim for injury alleged to have been caused by the radioactive, toxic, or other hazardous properties of nuclear material — if actionable at all — must be brought under the PAA.[4] Moreover, state tort law does not operate independently from federal law within the adjudicatory framework of the PAA. Rather, in the PAA Congress has borrowed state law to provide the substantive rules of decision — as a matter of *federal* law.[5] And, within this scheme, the borrowed state law is subservient to federal law — it must be disregarded to the extent it is inconsistent with the PAA. *See* 42 U.S.C. § 2014(hh).[6] Beyond this, trial of any nuclear tort claim is, at the defendant's option, in federal court. *See id.* § 2210(n)(2) (removal provision).[7]

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[4] *See, e.g., In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 854 (3d Cir. 1991) ("*TMI*") ("After the [Price-Anderson] Amendments Act, no state cause of action based upon public liability exists. A claim growing out of any nuclear incident is compensable under the terms of the Amendments Act or *it is not compensable at all.*"); *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1099-1100 (7th Cir. 1994) ("a state cause of action is not merely transferred to federal court; instead, a new federal cause of action supplants the prior state cause of action").

[5] *See TMI*, 940 F.2d at 856 (in the PAA "Congress intended that the rules of decision constitute federal law").

[6] *See also O'Conner*, 13 F.3d at 1100 ("Congress did not adopt in wholesale fashion state law. State law serves as the basis for the cause of action only as long as state law is consistent with the other parts of the Act.").

[7] *See also TMI*, 940 F.2d at 857 (the PAA "channels all legal liability to the federal courts, through [the newly created federal] cause of action").

In short, respondents are simply wrong in contending (Br. in Opp. 3) that the PAA does not create an exclusive federal remedy for nuclear torts. Allowing tribal courts to adjudicate nuclear tort claims such as those brought by respondents would conflict directly with the PAA's comprehensive adjudicatory scheme for public liability actions.

4. Respondents assert that the Tenth Circuit's decision in this case does not conflict with those of this Court or other courts of appeals. Br. in Opp. 2, 9-10. But the decision below is clearly in conflict with this Court's analysis in *Strate*. Moreover, as shown in the petition (at pp. 13, 18-19), other courts of appeals have refused to require exhaustion of tribal remedies in analogous situations. The Tenth Circuit here has gone far beyond any other court of appeals in requiring tribal exhaustion in the face of strong — indeed, congressionally recognized — countervailing federal interests.

In fact, in holding that petitioners must exhaust tribal court remedies, the court of appeals engaged in a "comity analysis" in which it expressly refused to consider the strong federal interests reflected by the AEA and PAA. Pet. App. 18a-22a. If the court had weighed the competing federal and tribal interests, it would have been compelled to conclude that the federal interests in maintaining exclusive regulatory control over nuclear health and safety matters and in preserving an exclusive federal remedy for nuclear tort claims easily overcome any tribal interests in adjudicating respondents' claims.

5. The decision below is of substantial concern to a number of industries in addition to the nuclear industry. *See, e.g.*, Brief *amicus curiae* of the Association of American Railroads ("AAR"). The AAR brief demonstrates why the Tenth Circuit's refusal to consider competing federal interests when applying the tribal exhaustion rule raises serious

concerns for the nation's railroads. AAR Br. 5-12. Likewise, the brief *amici curiae* of the Montana School Boards Association, *et al.*, illustrates a key concern expressed in *Strate*: the ability of government to regulate effectively in a particular area is undermined if an unrelated governmental entity is allowed to wield adjudicatory power. The far-reaching impact of the court of appeals' decision underscores the importance of the question presented and further demonstrates why that question warrants review by this Court.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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